No. 91-7328

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

LEONEL TORRES HERRERA,

*Petitioner,*

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

*Respondent.*

On Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

# RESPONDENT'S BRIEF

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## QUESTIONS PRESENTED

1. Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death.

2. What post-conviction procedures are necessary to protect against the execution of an innocent person.

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# RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein ("the Director"), by and through the Attorney General of Texas, and files this Brief.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on February 18, 1992, and is published as *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992). JA 59.[1]

[1] "JA" refers to the Joint Appendix. "SR" refers to the statement of facts of Herrera's trial, with the volume designated by Roman numeral and the page by Arabic number. "Tr." refers to the transcript of Herrera's trial. "Ex." refers to the exhibits that are contained in the appendix submitted to the federal district court with Herrera's petition for writ of habeas corpus.

## JURISDICTION

Herrera invokes the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Herrera bases his claims upon the Eighth and Fourteenth Amendments of the United States Constitution.

## STATEMENT OF THE CASE

### *A. Course of Proceedings Below*

By an indictment filed on October 14, 1981, Herrera was charged in the 197th District Court of Cameron County, Texas, with the capital murder of Enrique Carrisalez, a peace officer acting in the lawful discharge of an official duty. TEX. PENAL CODE ANN. §19.03(a)(1). On his plea of not guilty, a jury found Herrera guilty as charged in the indictment on January 20, 1982. On January 21, 1982, after a separate hearing on punishment, the jury affirmatively answered the two special issues submitted to it pursuant to Article 37.071 of the Texas Code of Criminal Procedure. Thereafter, in accordance with Texas procedure, the trial court assessed Herrera's punishment at death. Herrera's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals, which affirmed on October 31, 1984, and denied rehearing on January 16, 1985. *Herrera v. State*, 682 S.W.2d 313 (Tex. Crim. App. 1984). This Court refused certiorari review on May 28, 1985. *Herrera v. Texas*, 471 U.S. 1131 (1985).

Herrera's execution was scheduled for August 16, 1985. On July 26, 1985, Herrera filed an application for a writ of habeas corpus pursuant to Texas Code of Criminal Procedure art. 11.07 (Vernon Supp. 1991) in the convicting court, which recommended on July 25, 1985, that relief be denied. On



August 2, 1985, the Texas Court of Criminal Appeals denied relief. *Ex parte Herrera*, Application No. 12,848-02 (Tex. Crim. App. 1985).

On August 7, 1985, Herrera filed a petition for habeas corpus in the United States District Court for the Southern District of Texas, McAllen Division. On October 23, 1989, the court concluded that Herrera had failed to make a showing of a denial of a federal constitutional right as required under 28 U.S.C. § 2254 and denied Herrera's federal habeas corpus petition. *Herrera v. McCotter*, No. B-85-343 (S.D. Tex. 1989). The judgment was affirmed on June 25, 1990, *Herrera v. Collins*, 904 F.2d 944 (5th Cir. 1990), and certiorari was denied by this Court on October 15, 1990. *Herrera v. Collins*, ___ U.S. ___, 111 S.Ct. 307 (1990).

On October 30, 1990, the trial court issued a warrant setting Herrera's execution for December 17, 1990. Herrera filed an application for a second state writ of habeas corpus and a motion for stay of execution on December 12, 1990. The following day, the trial court modified Herrera's execution date to January 23, 1991. On January 2, 1991, the trial court recommended that relief be denied. On January 14, 1991, the trial court withdrew its January 2nd order, entered findings of facts and conclusions of law, and denied relief.

On January 17, 1991, the Texas Court of Criminal Appeals ordered the cause filed and set argument on Herrera's allegation that the Texas capital sentencing scheme did not allow the presentation or consideration of constitutionally mitigating evidence. The Court of Criminal Appeals denied relief on May 29, 1991, on the basis of the trial court's findings and conclusions and denied rehearing on September 18, 1991. *Ex parte Herrera*, 819 S.W.2d 528 (Tex. Crim. App. 1991).

Following the issuance of mandate from the Court of Criminal Appeals, the trial court scheduled Herrera's execution for February 19, 1992. On December 17, 1991, Herrera filed a

petition for writ of certiorari in this Court to review the state court's denial of collateral relief. The petition was denied on February 19, 1992. *Herrera v. Texas*, ___ U.S. ___, 112 S.Ct. 1074 (1992).

On February 16, 1992, Herrera filed a second petition for federal writ of habeas corpus in the district court, raising five claims for relief. The district court dismissed all but the first of these claims as an abuse of the writ. JA 33-53. The district court initially granted summary judgment for the Director with respect to the part of Herrera's first claim that was based on *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that insufficient facts were presented to support his assertions. JA 52. The district court retained jurisdiction with respect to the remaining portion of Herrera's first claim, which related to his assertion of innocence. *Id.* The order did not indicate that the district court credited the claim of actual innocence; rather, the court's objective in retaining jurisdiction was to allow Herrera to present the claim of innocence in a proper manner to the state courts. JA 52-53. The district court also ordered a stay of execution pending a hearing, at which time the district court intended to dismiss the federal habeas petition if Herrera had filed an appropriate pleading in state court. JA 52. Subsequently, on Herrera's motion filed February 18, 1992, pursuant to Federal Rule of Civil Procedure 59(e), the district court allowed Herrera to amend his petition, withdrew that portion of the earlier order that dealt with allegations of *Brady* violations, and set an evidentiary hearing on Herrera's contention of *Brady* violations and actual innocence. JA 54.

Thereafter, on February 18, 1992, the United States Court of Appeals for the Fifth Circuit vacated the stay of execution on the Director's motion and denied relief on all claims. *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).[2] On

[2] In the evening of February 18, 1992, Herrera sought rehearing of the Fifth Circuit's denial of relief, raising for the first time a February 17, 1992, affidavit of Raul Herrera, Jr., whose January 29, 1992, affidavit

*(footnote continued on next page)*



February 19, 1992, without delineating the questions it wished to consider, this Court granted Herrera's petition for writ of certiorari. *Herrera v. Collins*, ___ U.S. ___, 112 S.Ct. 1074 (1992). In Herrera's brief to this Court, he posed the issues as follows:

1. Whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime for which he or she was convicted and sentenced to death.

2. What post-conviction procedures are necessary to protect against the execution of an innocent person.[3]

After this Court granted Herrera's petition for a writ of certiorari, the Texas Court of Criminal Appeals stayed Herrera's execution.

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*(footnote continued from previous page)*
formed the primary basis for Herrera's *Brady* and "innocence" claims in his petition. Despite its availability, Herrera did not offer this subsequent affidavit as support for his Rule 59(e) motion in the district court. The Court of Appeals denied the motion for rehearing in a minute order entered in the late evening of February 18, 1992.

[3] In his original petition for a writ of certiorari, Herrera framed the questions as follows:

1. Does it violate the Eighth and Fourteenth Amendments to execute a person who has been convicted of capital murder but is innocent?

2. If so, must state courts provide a meaningful mechanism for hearing claims of actual innocence in death penalty cases?

3. What procedures are necessary in federal court for adjudicating claims of actual innocence in a death penalty case?

## *B. Statement of Facts*

### 1. Evidence of Herrera's Guilt

Shortly after 10:50 p.m. on September 29, 1981, a private citizen, Richard Dickinson, found the body of Texas Department of Public Safety (DPS) Officer David Rucker lying in the road beside his patrol car on Farm to Market Road (FM) 100 about 6.2 miles east of Los Fresnos, Texas. SR XIII 62, 65, 71, 120-21.[4] After using the patrol car's radio to call for help, Dickinson saw Leonel Herrera's Social Security card lying near the trooper's body. SR XIII 121-22, 124.[5]

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[4] Rucker's duties with the Department of Public Safety were accident investigation and traffic enforcement. SR XIII 64. Prior to Richardson's arrival on the scene, at least two civilian witnesses observed a member of the DPS engaged in traffic control in the area of Trooper Rucker's death, and he issued a speeding ticket to Alberto Munoz in the same area at 10:39 p.m. SR XIII 101, 107-109, 114.

Rucker was killed by a perforating gunshot wound from a bullet that entered the head behind and slightly above the right ear. SR XIII 65, 103, 123; XIV 140-145. The muzzle of the gun was one to two feet from his head when it was fired. SR XIV 141, 151. In addition to this major injury, there was an irregular cut in the skin of the bridge of Rucker's nose, and the bones of the nose were fractured, possibly as the result of a blow to the face before the bullet was fired into the head. SR XIV 147. Several buttonholes on the front of Rucker's uniform were slightly torn, as though there had been a struggle. SR XIV 139, 146-147, 152; XV 6. Although Rucker was wearing a gunbelt, it was empty, and the holster was in an odd position, pulled away from the body, as though the pistol had been removed from the holster after he had fallen to the ground. SR XIII 66-67, 123; XIV 162-163; XV 4. Rucker's partner, who was not with him on the night of the murder, testified that certain items that were normally located in their patrol car were missing after the murder, including a nightstick and a slapper. SR XIII 137-138.

[5] Guadalupe Rosales, a constable with Cameron County, also saw the Social Security card in the roadway about seven feet from the body. SR XIII 128, 130-131.



Shortly before 10:54 p.m. on the night of Rucker's murder, Los Fresnos Police Officer Enrique Carrisalez observed a speeding vehicle traveling west on FM 100 toward Los Fresnos away from where Rucker's body was found. SR XII 27, 41-44. A civilian, Enrique Hernandez, was riding with Officer Carrisalez at the time. SR XII 20.[6] When the speeding car went directly in front of the patrol car, Hernandez, who was sitting in the front seat, saw only one person in the vehicle. SR XII 28-29, 66.

Carrisalez activated the lights on the patrol car and followed the speeder, who stopped for 30 to 32 seconds at a red light, at which time the police unit was only a couple of feet behind his car. SR XII 29, 40-41. While the vehicles were stopped at the intersection, Hernandez saw the driver look at them in his rear view mirror and make a hand motion indicating that he would pull over. SR XII 30, 44. Both vehicles then turned left and stopped. SR XII 30, 41-42. As the patrol car turned at the intersection and pulled up behind the speeder, Officer Carrisalez told the police dispatcher the license number of the car he was stopping. SR XII 42-43.

Carrisalez parked two or three feet behind the speeder's car, at an angle so that the high beams of the patrol unit illuminated the driver's side of the speeder's car. SR XII 42, 44, 46, 104. The overhead flashing lights also were still operating. SR XII 42. Hernandez had such a clear view of the interior of the car that he could see a sharp object approximately an inch long, which perhaps was a shark's tooth, hanging directly under the mirror. SR XII 44.

At 10:54 p.m., Carrisalez took his flashlight and walked toward the speeder's car, stopping near the back tire on the

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[6] Hernandez had received special training in the military in the observation and identification of aircraft. SR XII 14-17, 72-78. He had ridden with police officers, usually at night, about twice a month for the past eight years and had witnessed a number of arrests. SR XII 20-22; XIII 14.

driver's side. SR XII 44-45. By the time Carrisalez reached that point, the speeder had his car door open and was leaning out and looking back at the officer. SR XII 46-47, 91. Hernandez saw the men say something to each other, but he could not hear what was said. SR XII 47. Carrisalez took two or three steps backward. SR XII 47. At the same time, through the back window of the speeder's car, Hernandez saw the speeder reach for something around the middle of the car seat. SR XII 48, 91. The speeder got out of the car, took two or three steps toward Officer Carrisalez, drew his hands together in front of him, and fired one or more shots. SR XII 48-50. Hernandez saw Carrisalez twist down to his right side. SR XII 50. Carrisalez, who had been shot in the chest, died nine days later from the wound. SR XIV 137-38. Hernandez made an emphatically unequivocal in-court identification of Herrera as the person he saw shoot Carrisalez. SR XII 54; XIII 30.

When the shots were fired, Hernandez ducked down in the seat of the patrol car. SR XII 50. He remained leaning down on the seat for no longer than four to five seconds, then sat up just far enough to look over the dashboard to see what was happening. SR XII 54. He saw Herrera get back into his car and drive away. SR XII 54-55. Hernandez used the police radio to call for assistance. SR XII 56-57.

Prior to the shots, Hernandez observed Herrera at the side of his car from a distance of fifteen to sixteen feet for a period of approximately 14 seconds with the lights illuminating him. SR XII 51, 102. Hernandez could see Herrera's expression, which was one of "anger and concentration." SR XII 68-70, 108.[7]

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[7] Hernandez observed Herrera closely enough to describe him as being six feet to six feet two inches tall, as weighing 165 to 180 pounds, and as wearing a light-colored or white shirt and dark pants. SR XII 52, 106-107. His complexion was light brown like someone of Spanish descent, his black hair was short and clean cut, and he had a light moustache, like an overnight growth. SR XII 52-53, 107.



On October 1, Los Fresnos Police Chief Ruben Garcia and Officer Richard Gonzales showed Officer Carrisalez a photograph of Herrera. SR XV 162, 168-69.[8] Carrisalez was unable to speak because of the tubes in his mouth, but when Gonzales held the picture where he could see it, Carrisalez nodded his head affirmatively. SR XV 162, 168-69, 179. When Garcia then asked Carrisalez whether he was sure that this was the man who had shot him, Carrisalez nodded. SR XV 169, 179.[9] After seeing the picture of Herrera, Carrisalez became very agitated and had to be sedated. SR XV 178, 180.[10]

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[8] When Carrisalez was in the ambulance on the way to the hospital, he told the paramedics that he was going do die, SR XV 143-146, and he was aware during the period of his hospitalization that he was extremely ill. SR XV 152. Prior to showing him the photograph, Gonzales had heard that Carrisalez had a stroke. SR XV 161. Although Carrisalez was on a respirator throughout his hospitalization, he was conscious and fully aware of his surroundings during the first several days. SR XV 151.

[9] Carrisalez recognized the men when they came to his bedside, and he knew what he was doing. SR XV 163, 169. A nurse, who was present when the photograph was shown to Carrisalez, testified that although he was in critical condition at the time, he knew what was happening; he had not been sedated and was not under the influence of drugs at the time the picture was shown to him. SR XV 178.

[10] The Texas Court of Criminal Appeals ruled that the identification procedure utilized with respect to Carrisalez was not unduly suggestive, and that the identification was based on Carrisalez' independent recollection. *Herrera v. State*, 682 S.W.2d at 319. The federal district court agreed that, while the display of a single photograph to Carrisalez was suggestive, it was not impermissibly suggestive under the circumstances. Second Amended Memorandum October 23, 1989 at 13. The district court held that "there can be little doubt as to the reliability of Carrisalez' identification." *Id.* at 14. After incorporating the factual findings of the Texas Court of Criminal Appeals, the district court concluded that the "showing of a single photograph did not create a substantial likelihood of misidentification." *Id.* at 15. The Fifth Circuit agreed. *Herrera v. Collins*, 904 F.2d at 949.

Later that same day, Garcia showed the single photograph of Herrera to Hernandez. SR XV 170-71.[11] Hernandez had been shown a photo array on the morning after the shooting, but did not identify anyone. SR XII 80, 108-09; XV 96-97. Instead, he picked three pictures, including Herrera's, as looking like the shooter. SR XII 109-14; XIII 24. He wanted to be absolutely sure before he made an identification, and Herrera's hair was longer in the photo array than it had been the night of the shooting. SR XIII 24. Subsequently, on October 6, Hernandez viewed a second photo array and selected Herrera's picture. SR XIII 33-34. Hernandez also attended a physical lineup on October 24, at which time he recognized Herrera as soon as he stepped into the observation area. SR XII 80-81, 115; XIII 3-7, 21-22; XV 94-95, 99.

Through the license tag number, law enforcement agencies determined that the person who had shot Officer Carrisalez was driving a 1978 Cougar automobile that was registered to Leonel Herrera. SR XIII 146-47.[12] When a chemist

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[11] The Texas Court of Criminal Appeals concluded that the showing of a single photograph to Hernandez was required by exigent circumstances and was not unduly suggestive. *Herrera v. State*, 682 S.W.2d at 317-319. The state court further concluded that, even if the procedure was impermissibly suggestive, Hernandez' in-court identification was based on an independent origin and therefore was admissible. *Id.* at 319. The federal district court concluded that the showing of a single photograph had been suggestive but that, because of the circumstances existing in this case, it was not impermissible. Second Amended Memorandum October, 23, 1989 at 8-9. After analyzing the totality of the circumstances, the district court further concluded that the showing of the single photograph to Hernandez did not create a substantial likelihood of misidentification. *Id.* at 10-13. The Fifth Circuit agreed with the conclusions of the district court. *Herrera v. Collins*, 904 S.W.2d at 947-948 & n.2.

[12] Once the vehicle was identified, Herrera's residence was placed under surveillance. SR XIII 147-153; XIV 5-7. At approximately 3:00 in the morning after the murders, Edinburg police found the car in the driveway at 1116 Samano and talked with Oralia Morales, the person who lived there. SR XIV 7-8. Morales said that she had seen Herrera with the car on the

*(footnote continued on next page)*



for the Department of Public Safety examined Herrera's car at 7:30 a.m. on the morning after the shooting, there were splatters of Type A human blood, which were less than 24 hours old, on the hood, the left front fender, and the grill on the front bumper of the car. SR XIV 27-30, 52, 62. In addition, there was Type A human blood on the right arm rest of the driver's seat, the left front of the passenger seat, the gas pedal, and the driver's floormat. SR XIV 36-38, 59. Trooper Rucker had Type A blood. SR XIV 50. Herrera had Type O blood. SR XIV 36.

In addition, the DPS chemist found a hair on the floormat of the car that was coated in some places with blood and contained tissue adhering to the roots, which indicated that the hair was pulled out as opposed to falling out. SR XIV 38-39, 43-44, 60-61. After microscopically comparing the hair from the floorboard with hairs from Rucker and Herrera, the chemist concluded that the hair had the same physical characteristics as some of Rucker's hair, but it was a different color and had a different internal structure than Herrera's hair. SR XIV 39, 42-43.

Patricia Hulen, a forensic serologist with the Department of Public Safety, conducted additional tests on the blood that was obtained from Herrera's car. SR XIV 77, 81-83. She determined that the blood on the floormat was identical to Trooper Rucker's blood type (Type A) and enzyme group. SR

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*(footnote continued from previous page)*
previous morning, but she had not seen him afterward and did not know how the car had gotten into her driveway. SR XIV 9. Although Morales owned the car, she did not have a set of keys to it. SR XIV 9-10. She gave the officers written permission to take the car from her driveway to McAllen to process it for evidence. SR XIV 9-11. The officers noticed blood both on the inside and the outside of the car. SR XIV 8-9, 13-14. Later in the morning, after the car had been photographed and processed by the chemist, DPS investigator Joel Young found the imprint of a gun under the rug on the passenger side of the front seat. SR XIII 15-18. Personal papers in Herrera's name were found in the glove compartment of the car. SR XIII 20-21. When Enrique Hernandez subsequently saw the impounded car, he identified it as the one that had been involved in the shooting. SR XII 59-62.

XIV 36, 85. Herrera has both a different blood group (Type O) and a different enzyme profile. SR XIV 36, 85. Only 6% of the population (and only 4% of the Mexican-American population) has blood in the particular combination of blood group and enzyme group that was found on the floormat. SR XIV 88, 90.

Herrera was arrested on October 4, 1981, at a house in Hidalgo County, Texas, which is west of and contiguous to Cameron County, where the murders occurred. SR XV 7. The owner of the house, Gustavo Salinas, consented to a search of the residence. SR XV 19. From the floor of the laundry room, the police recovered a pair of Herrera's blue jeans that contained a set of keys to the 1978 Cougar he had been driving. SR XV 19-21, 36-38, 40-41.

Drops of blood on the leg of the jeans that were recovered in the laundry room were tested by DPS chemist Robertson and found to be Type A human blood. SR XIV 57-58; XV 48-49, 52.[13] Robertson also found spots and smears of Type A human blood inside Herrera's wallet, which was in his rear pocket when he was arrested. SR XV 25, 50. The blood appeared to have dropped into the wallet. SR XV 51.

During a physical search of Herrera after he was arrested, the police recovered a letter from his hip pocket. SR XV 45, 70-72.[14] Subsequent analysis demonstrated that prints from the middle finger of Herrera's left hand and his left index finger were on one page of the letter and the envelope in which this letter was contained. SR XV 107-10. In relevant part, the letter said:

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[13] There also was human blood on a white pullover shirt and a blood smear on the back of the heel of a right shoe that were given to Robertson for analysis, but he was not able to classify it. SR XIV 58.

[14] Following the arrest, when Texas Ranger Bruce Casteel was talking with Herrera at the Edinburg Police Department, Herrera told Casteel that, in order to understand what happened on the night of September 29, 1981, he should read this letter. SR XV 71-72.



To whom it may concern: I am terribly sorry for those I have brought grief to their lives. Who knows why? We cannot change the future's problems with problems from the past. What I did was for a cause and purpose. One law runs others, and in the world we live in, that's the way it is.

I'm not a tormented person. I am sane in every way. . . .

I believe in the law. What would it be without this men that risk their lives for others, and that's what they should be doing -- protecting life, property, and the pursuit of happiness. Sometimes, the law gets too involved with other things that profit them. The most laws that they make for people to break them, in other words, to encourage crime.

What happened to Rucker was for a certain reason. I knew him as Mike Tatum. He was in my business, and he violated some of its laws and suffered the penalty, like the one you have for me when the time comes.

My personal life, which has been a conspiracy since my high school days, has nothing to do with what has happened. The other officer that became part of our lives, me and Rucker's (Tatum), that night had not to do in this. He was out to do what he had to do, protect, but that's life. . . .

If this is read word for word over the media, I will turn myself in; if not, don't have millions of men out there working just on me while others -- robbers, rapists, or burglars -- are taking

advantage of the law's time. Excuse my spelling and writing. It's hard at times like this.

SR XV 82-84.

After being convicted of the murder of Officer Carrisalez, Herrera pled guilty on July 6, 1983, to the murder of Trooper Rucker.[15]

### 2. Herrera's Newly Presented Evidence

To establish his claim of innocence, Herrera relies on affidavits from four people: (1) a hearsay affidavit from Hector Villarreal, an attorney who represented Raul Herrera, Sr. ("Raul, Sr."), one of Herrera's brothers, in 1984 -- two years after Herrera's trial -- to whom Raul, Sr., allegedly confessed to the capital murders; (2) a hearsay affidavit prepared in 1991 from Juan Palacios, who states that while they were in jail together in 1984, Raul, Sr., said that he and not Herrera murdered the police officers; (3) a hearsay affidavit prepared in 1991 in which a friend of the Herrera brothers, Jose Ybarra, Jr., states that in 1983 Raul, Sr., said that he was the one who killed the two law enforcement officers; and (4) an affidavit prepared in 1992 in which Herrera's nephew, Raul Herrera, Jr. ("Raul, Jr."), states that he and a man named Chavello Lopez were in the car when his father, Raul, Sr., who died in 1984, shot the two police officers.

The hearsay affidavits of Palacios and Ybarra provide no details as to the alleged commission of the offense by Raul

[15] Herrera implies that he pled guilty because he was beaten by officers at the Texas Department of Criminal Justice on June 21, 1983. Significantly, however, he has never challenged his conviction for the murder of Trooper Rucker on the ground that his plea was coerced or involuntary. Herrera's plea was not entered until July 6, 1983, some two weeks after the altercation. The affidavits that Herrera provided to the district court made no connection between the alleged beating and the plea of guilty, and the two incidents are so attenuated in time as to belie any linkage.



Herrera, Sr. The affidavits of Hector Villarreal and Raul Herrera, Jr., are irreconcilably inconsistent.

Villarreal averred that Raul, Sr., told him there were two people--himself and an unnamed East Coast "drug dealer"--in the car when Rucker and Carrisalez were murdered. Ex. 10 at 2. According to Raul, Jr., there were three people in the car: himself, his father and Chavello Lopez, Raul, Sr.'s, best friend and business partner. Ex. 16 at 1.

According to Villarreal, Raul, Sr., told him that Leonel Herrera's job as part of the Herrera family cocaine ring was to "cut" the drug on Padre Island, which lies in the Gulf of Mexico just off the southern tip of Texas, and he and the East Coast dealer were driving west from Padre Island when the murders of Rucker and Carrisalez took place between the Cameron County towns of Port Isabel and Los Fresnos. Ex. 10 at 2. See Appendix A, a map of the area. According to Raul, Jr., the Herrera vehicle was eastbound from the Hidalgo County town of Edinburg to Port Isabel, which is between Los Fresnos and Padre Island, when the murders were committed. Ex. 16 at 3.

According to Villarreal, Raul, Sr., told him that "Rucker pulled them over," and Raul, Sr., shot him after they argued. Ex. 10 at 2. According to Raul, Jr., Rucker "met us at a rest stop" before he was killed. Ex. 16 at 3.

Finally, Raul, Jr., averred that (1) at the time of the murders, Leonel Herrera was with Raul, Jr.'s, grandmother and Aunt Norma at their home on Eighteenth Street in Edinburg, and (2) his father talked to Leonel Herrera's common-law wife, Lali, that night after the murders. Ex. 16 at 3-4. These assertions are significant because "Aunt Norma," Norma H. Rodriguez, has executed two affidavits that Herrera has tendered in support of his application for federal habeas relief. In the first affidavit, executed on December 7, 1990, she states that "I saw Leo on the day the murders happened. It was early in the day. . . ." Ex. 8 at 7. There is no mention that she possessed knowledge of any

alibi defense. In the second affidavit, executed on December 10, 1990, she made no statement regarding Leonel Herrera's whereabouts on the night of the murders. Ex. 2. In addition, both the grandmother, Maria Torres Herrera, and the common-law wife, Oralia Morales, submitted affidavits in support of Herrera's federal petition, Ex. 4 & 6, both of which are silent as to the events recounted in Raul, Jr.'s, affidavit.

## SUMMARY OF ARGUMENT

Herrera is not an innocent man but one who has been found guilty beyond a reasonable doubt by twelve jurors following a trial that conformed with the requirements of the Constitution. His newly discovered evidence of alleged innocence is incredible and inconsistent with undisputed trial evidence as well as internally inconsistent.

The failure of the state to afford Herrera a post-trial procedure in which to relitigate his guilt offends no existing guarantee of the Eighth Amendment or due process. Herrera's claim of actual innocence is directed to the guilt-innocence inquiry and does not implicate the Eighth Amendment, which by its terms concerns only matters of bail and punishment and, in the capital sentencing context, guarantees procedures designed to insure reliable assessment and appropriate imposition of death sentences. Due process was satisfied by the state's introduction of evidence sufficient to satisfy a rational jury beyond a reasonable doubt of the existence of every element of the offense. The Constitution does not guarantee post-trial review of convictions, much less a post-trial procedure by which a court can reassess the jury's determination of guilt in light of belatedly proffered evidence.

Existing procedures in the state and federal courts, as well as the clemency and commutation powers of the executive branch, adequately assure that an innocent person will not be convicted, sentenced to death, and executed. The limitations placed by Texas on the post-trial consideration of newly



discovered evidence relevant to guilt as a basis for upsetting a conviction are in accord with the contemporary practice of the majority of states, and there clearly is no historical precedent for post-trial assessment of the sufficiency of the evidence based on newly discovered evidence relevant to guilt.

Executive clemency is the appropriate vehicle to prevent an inappropriate imposition of a death sentence and to achieve justice in situations where doubt as to guilt cannot result in reversal or a new trial under existing legal standards. Unconstrained by evidentiary rules and procedure, the executive authority is free to grant clemency to someone like Herrera whose claim of actual innocence is undermined by the fact that his newly discovered evidence is predominantly hearsay testimony of family members and acquaintances, and is both internally inconsistent and inconsistent with the uncontroverted evidence offered at trial.

The post-conviction review sought by Herrera would necessitate an unwarranted expansion of both substantive and procedural protections. With respect to the ultimate issue at the state trial, the question of an individual's guilt or innocence of a state offense, the Court already has struck the appropriate balance between federal and state interests and the requirements of federalism. The federal courts can assure the rationality of the trial outcome by reviewing the sufficiency of the evidence. A determination of a state prisoner's "real" or "actual" guilt of a state offense based on a post-trial proffer of newly discovered evidence is both the most intrusive into the states' power to regulate procedures under which its laws are carried out and the least necessary exercise that a federal habeas court could undertake.

If, despite the considerable interests militating against such consideration, the Court determines that the Eighth Amendment requirement of heightened reliability and the finality of a death sentence require consideration of claims based solely on newly discovered evidence relevant to guilt,

review should be limited to those cases where the state fails to provide a procedure by which a death-sentenced inmate can obtain a new trial upon showing by clear and convincing evidence that newly discovered evidence of actual innocence (1) was unavailable at the time of trial and at the time of all prior writs, (2) would be admissible upon retrial, and (3) is such that upon retrial no reasonable juror could find him guilty of the capital offense. If the state does provide such a procedure, further inquiry by the federal courts is unwarranted.

Regardless of the standard applied to Herrera's claim of actual innocence, his evidence is so incredible and inconsistent that it cannot rationally be considered to be probative of actual innocence.

## ARGUMENT

### I.

### HERRERA HAS NOT BEEN DENIED ANY OF THE PROTECTIONS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

Herrera does not come before this Court as an innocent man, but rather as one who, after being tried and afforded an opportunity to raise all available defenses to his conviction, has been found guilty beyond a reasonable doubt by the unanimous vote of twelve jurors. "The purpose of the trial from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). The presumption of innocence therefore no longer applies to Herrera. Thus, the question posed by Herrera, "[w]hether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent of the crime" for which he was convicted and sentenced to death, does not accurately reflect the issue presented by his case.



There is no possibility in Herrera's case that an innocent man has been convicted of a crime that he did not commit. Evidence of Herrera's guilt of the murder of Enrique Carrisalez is overwhelming, *see Herrera v. State*, 682 S.W.2d at 320, and every court that has reviewed his conviction and evaluated his constitutional claims has found that he received a fair trial.[16]

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[16] In his "Statement of the Case," Herrera attempts to create the impression that his arrest was the result of police corruption, that his trial was conducted in an atmosphere of adverse publicity, and that he was convicted by jurors who were prejudiced against him. This description is inaccurate.

Herrera's allegations of police corruption rely on newspaper clippings that make no reference at all to the instant case and do not contain even a hint of police complicity in drug activity in South Texas prior to 1985 -- three years after Herrera's trial. Further, the newspaper clippings relate to Hidalgo County; they contain nothing to suggest that anyone who testified at Herrera's trial or participated in his arrest, or any officials in Cameron County, where Herrera's trial occurred, have ever been involved in any wrongdoing.

Herrera's allegation that his trial was conducted in an atmosphere of prejudicial publicity is likewise incorrect. The federal district court, in ruling upon Herrera's first state petition, considered this issue in the context of a claim of ineffective assistance of counsel that was premised in part on the attorney's failure to request a change of venue and his alleged failure to conduct *voir dire* with respect to pretrial publicity. The district court concluded that pretrial publicity had not undermined the fairness of Herrera's trial. Second Amended Memorandum October 23, 1989, at 31-32. The district court further found that each of Herrera's jurors was examined regarding actual or potential prejudice toward him and that each of them demonstrated an ability to be impartial. *Id.* at 34.

Likewise, the district court rejected Herrera's claims that he was prejudiced because a police officer and friends of police officers served on his jury. After considering this claim, the federal district court concluded that Herrera's argument is "centered on mere speculation . . . unsubstantiated by any evidence or law." JA 41, 43. The district court further noted that Herrera had not presented this claim in his first federal habeas petition and that nothing had prevented him from doing so. JA 42. This conclusion coincided with the factual findings of the state trial court. JA 6.

The evidence of "innocence" that Herrera proffers to the Court some ten years after his trial is contrary to the trial testimony, the physical evidence in the case, his own admissions with respect to the offense, and his plea of guilty to the related murder of Trooper David Rucker. Moreover, the affidavits that Herrera has belatedly presented to the courts are so incompatible with the trial evidence and so self-contradictory that they are, quite simply, incredible.

Herrera was identified as the gunman by two eyewitnesses, an identification that was corroborated by his own written statement as well as a wealth of circumstantial evidence. The credibility of his latter-day assertion of innocence is completely undermined by his guilty plea to the murder of Trooper Rucker, a crime that is inextricably linked to the murder of Officer Carrisalez not only by Herrera's written statement but also by the fact that blood of Trooper Rucker's relatively rare type was found on and inside the vehicle driven by the gunman who shot Carrisalez and on Herrera's wallet. The affidavits of family members and acquaintances, proffered in support of the theory that Herrera's dead brother, Raul, Sr., murdered Officer Carrisalez, are so inconsistent that they cannot be credited. The affidavits of Villareal and Raul, Jr., differ both as to the number and identity of the individuals who were allegedly with Raul, Sr., and as to the direction in which Raul, Sr., was driving when the murders were committed. Further, the affidavits are contradicted by Hernandez' testimony that there was only one person in Herrera's vehicle. Finally, the affidavits do not explain Herrera's failure to offer alibi testimony of his mother and aunt at trial or why his brother's alleged identity as the murderer was not disclosed shortly after his brother's death in 1984.

Thus, the question before this Court is not whether the Eighth and Fourteenth Amendments permit a state to execute an individual who is innocent, but rather, whether those amendments require the establishment of special post-trial procedures by which a convicted defendant may, at any time



after trial, belatedly assert new evidence in an attempt to retry the guilt-innocence issue. Herrera inexcusably waited for more than nine years after his conviction to present his alleged evidence of innocence to a court and did so only on the eve of his execution. At issue are the time limitation imposed by the State of Texas on the filing of a motion for new trial and the failure of the state and federal courts in habeas review to provide a forum for challenges to the sufficiency of the evidence based on a post-trial proffer of newly discovered evidence.

### *A. The Eighth Amendment applies to issues of punishment, not issues of guilt-innocence.*

The Eighth Amendment, in its entirety, states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment, by its terms, therefore concerns only matters of bail and punishment.[17] In the capital sentencing context, the Eighth Amendment imposes procedural safeguards designed to secure "the reliability of the process by which the death penalty has been imposed," *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989), and procedures outside the sentencing phase have only been found to implicate the Eighth Amendment where they impact on the reliable assessment or the appropriate imposition of a death sentence. *See Ford v. Wainwright*, 477 U.S. 399 (1986) (the Eighth Amendment assures the reliable ascertainment of a prisoner's sanity as a predicate to lawful execution); *Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (when a capital jury is forced into an all-or-nothing choice between finding a defendant at once guilty of capital murder and sentencing him to death or finding him innocent and releasing him, there exists an impermissible risk of an unreliable assessment of sentence); *see also Schad v. Arizona*, 501 U.S. ___, ___, 111 S.Ct. 2491,

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[17] Summaries of the background and history of the Amendment confirm that its application has been limited to matters of punishment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-72 (1976); *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring).

2504-05 (1991). Herrera does not cite a single case in which this Court's application of the Eighth Amendment reflects concerns other than the reliable assessment or appropriate imposition of punishment, and the Director has found none.

The Eighth Amendment proscription against cruel and unusual punishment assumes that a conviction has occurred, and issues with respect to guilt-innocence are outside the scope of this Amendment. The gravamen of Herrera's complaint, however, is not that he has been inappropriately punished, but rather that he should never have been convicted in the first place. Because this is an issue of Herrera's guilt, and not an issue with respect to the punishment he received, it is not cognizable under the Eighth Amendment.

Contrary to Herrera's argument, *Ford* does not support the proposition that Eighth Amendment concerns of heightened reliability require a reviewing court to redetermine guilt whenever a death-sentenced inmate proffers newly discovered evidence in an attempt to establish reasonable doubt as to his guilt. In *Ford*, the Court noted the ancient prohibition on execution of the insane and that no state permitted executions under such circumstances, and therefore concluded that the Eighth Amendment prohibits the state from inflicting the penalty of death upon a prisoner who is insane. *Id.* at 410. The Court then found that certain procedural protections adhere to the determination of competency to be executed. *Id.* Unlike the situation presented in *Ford*, Herrera's claim of newly discovered evidence is at most relevant only to the guilt determination. His assertion that his death-sentenced status entitles him to relitigate his guilt after trial is entirely without historical precedent. Unlike the determination of competency to be executed, which is appropriately made near the time of a scheduled execution, a determination of guilt-innocence necessarily becomes less accurate with the passage of time from the offense. *Ford* simply does not support Herrera's argument that his death-sentenced status is sufficient, without more, to transform an issue with respect to the guilt-innocence determination into an Eighth



Amendment concern. *See also Franklin v. Lynaugh*, 487 U.S. 164, 174, 187 (1988) (residual doubt about guilt is not mitigating evidence which must be considered at the sentencing phase of a capital trial).

### *B. Herrera was not denied the process due under the Fourteenth Amendment.*

The Fourteenth Amendment guarantee of a fundamentally fair trial secures to defendants those procedures necessary to a reliable determination of guilt. Herrera was denied none of the procedures identified by existing precedent as being essential to the fundamental fairness guaranteed by the Fourteenth Amendment. Indeed, Herrera does not attempt to identify any deprivation of the process due with respect to either the trial or his first appeal as of right.

Due process with respect to sufficiency of the evidence was satisfied when the jury found Herrera guilty beyond a reasonable doubt. "[*In re*] *Winship* [397 U.S. 358 (1970)] presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). While due process requires that there be sufficient evidence to support a conviction, there is no authority for the proposition that evidence may be rendered insufficient by a post-trial proffer of evidence made in a belated attempt to establish doubt as to guilt. Post-trial claims of actual innocence based on newly proffered evidence never have been held to state a basis for relief independent of a denial of process or other constitutional violation. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

Moreover, the Constitution is not implicated by the limitations on review of Herrera's claim imposed by Texas procedures governing motions for new trial and state habeas

corpus. The Constitution does not guarantee post-trial review of convictions, much less a post-trial procedure by which a court can reassess the jury's determination of guilt in light of belatedly proffered evidence. While, where a state chooses to afford defendants a first appeal as of right, the due process and equal protection provisions of the Fourteenth Amendment require certain procedures to secure a fair and even-handed review, *see, e.g., Evitts v. Lucey*, 469 U.S. 387, 398-99 (1985) (and cases cited therein), the Court has made clear that, not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v. Giarratano*, 492 U.S. at 10; *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

## II.

## NO ADDITIONAL PROCESS IS REQUIRED BECAUSE EXISTING PROCEDURES ASSURE THAT AN INNOCENT PERSON WILL NOT BE CONVICTED, SENTENCED TO DEATH, AND EXECUTED.

The decision whether a particular practice violates the fundamental fairness guaranteed by the Due Process Clause is informed by historical and contemporary practice as well as recognized principles of fundamental fairness. *Medina v. California*, ___ U.S. ___, No. 90-8370, slip op. at 8-9 (June 22, 1992); *Schad v. Arizona*, 501 U.S. at ___, 111 S.Ct. at 2500 (plurality opinion). However, beyond the specific guarantees enumerated in the Bill of Rights, the requirements of due process are limited to the most basic procedural safeguards. *Medina v. California*, ___ U.S. at ___, slip op. at 7-15; *Patterson v. New York*, 432 U.S. 197, 210 (1977). "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, . . .' and its decision in this



regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Medina v. California*, ___ U.S. at ___, slip op. at 7, *quoting Patterson v. New York*, 432 U.S. at 201-02 (citations omitted).

The limitations placed by Texas on the post-trial consideration of newly discovered evidence relevant to guilt as a basis for upsetting a conviction are in accord with the contemporary practice of the majority of states. In addition to Texas, thirty-three other states and the United States strictly limit the time in which a defendant may present a motion for new trial based on newly discovered evidence. *See* Appendix B.[18] Moreover, there clearly is no historical precedent for post-trial assessment of the sufficiency of the evidence based on newly discovered evidence relevant to guilt. *See* discussion in Section III, *infra*. Finally, existing procedures in the state and federal courts, as well as the clemency and commutation powers of the executive branch, adequately assure that an innocent person will not be convicted, sentenced to death, and executed.

### *A. Constitutional requirements and post-trial review assure the accuracy of conviction and sentence.*

Herrera concedes, as he must, that "[a] vast array of due process protections helps to assure that no innocent person is convicted of a crime" (Petition at 34). Indeed, the constitutional protections adhering to capital trials and sentencing already

[18] However, the statutes governing post-conviction remedies of two of those states expressly allow for consideration of newly discovered evidence relevant to guilt. While twenty of the thirty-three states that limit the time in which a motion for new trial may be filed either do not place time limits on a defendant's use of state collateral review or have a statutory "cause exception" to time limits, none of these twenty states expressly includes newly discovered evidence relevant to guilt within the statutory scope of collateral review. *See* Appendix B.

render it virtually impossible to convict a truly innocent person. The integrity of the legal process in a criminal case is protected by rules governing the admissibility of evidence, the requirement that a defendant receive the effective assistance of counsel, the placement of the burden of proof on the prosecutor, the indispensable condition that guilt be found beyond a reasonable doubt, and similar measures. For those instances in which a prosecutor withholds exculpating evidence, post-trial relief is available under the doctrine of *Brady v. Maryland*. 373 U.S. 83 (1963). Because of these protections it is "unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford v. Wainwright*, 477 U.S. at 420 (Powell, J., concurring).

Moreover, the Texas Rules of Criminal and Appellate Procedure provide a post-trial mechanism by which a convicted person may present newly discovered evidence, including claims of innocence, to the courts. Herrera admits that such procedures exist in Texas, brief at 38, but complains that time limitations are placed upon the period within which an appropriate motion may be filed.

In Texas, a motion for new trial must be filed within thirty days of conviction. Whether this thirty days is designated discretionary or jurisdictional depends on the date of the conviction. Because Herrera was sentenced on January 21, 1982, his case is governed by Article 40.05 of the Texas Code of Criminal Procedure, as amended in 1981.[19] Although the

[19] For a person who was convicted prior to 1981, Article 40.05 of the Texas Code of Criminal Procedure provides that the trial court may entertain an untimely motion for new trial where good cause exists. *In re Whitmore*, 570 S.W.2d 889, 898 (Tex. Crim. App. 1977). September 1, 1986, was the effective date of current Rule 31 of the Texas Rules of Appellate Procedure. *Drew v. State*, 743 S.W.2d 207, 222 n.8 (Tex. Crim. App. 1987). At least one intermediate appellate court has held that, for a person who has been convicted after that date, Rule 2(b) of the Texas Rules of Appellate Procedure affords flexibility with respect to the thirty-day time limitation. *Callis v. State*, 756 S.W.2d 826, 827-828 (Tex. App. -- Houston [1st Dist.] 1988).



Texas Court of Criminal Appeals has on occasion considered the merits of an untimely motion for new trial under Article 40.05, *Drew v. State*, 743 S.W.2d 207, 226-29 (Tex Crim. App. 1987); *see also Anderson v. State*, 717 S.W.2d 622, 626 (Tex. Crim. App. 1986), Texas courts generally have treated the thirty-day time limitation under Article 40.05 as jurisdictional. *Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Drew v. State*, 743 S.W.2d at 222-29.

Moreover, the time limitation imposed by Texas' new trial procedure reflects the state's interest in reliable determinations of guilt as well as finality. See discussion in Section III, *infra*. The passage of time facilitates the fabrication of evidence and makes retrials progressively less reliable. "[W]hen a [defendant] succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986), prejudice the government and diminish the chance of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. ___, ___, 111 S.Ct. 1454, 1468 (1991).

Finally, the accuracy of conviction and sentence are further assured by state and federal habeas review. State collateral review encompasses claims of fundamental or constitutional error, *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989), but not challenges to the verdict based solely on newly discovered evidence relevant to guilt. *Ex parte Binder*, 660 S.W.2d 103, 104-06 (Tex. Crim. App. 1983).

Similarly, federal habeas review encompasses claims of federal constitutional dimension. While the existence of newly discovered evidence relevant to guilt does not establish a basis for federal habeas review where the evidence is unrelated to a constitutional violation, *Townsend v. Sain*, 372 U.S. at 317 (newly discovered evidence "must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas

corpus"); *accord Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 749 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989); *Ellis v. Collins*, 956 F.2d 76 (5th Cir.), *cert. & stay denied*, ___ U.S. ___, 112 S.Ct. 1285 (1992); *Burks v. Egeler*, 512 F.2d 221, 230 (6th Cir.), *cert. denied*, 423 U.S. 937 (1975); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980); *Byrd v. Armontrout*, 880 F.2d 1, 8 (8th Cir. 1989) (claim of newly discovered evidence relevant only to guilt not ground for habeas relief; failure of state to provide procedure for consideration of such evidence violates neither due process nor the Eighth Amendment), *cert denied*, ___ U.S. ___, 110 S.Ct. 1326 (1990); *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984), *cert. denied*, 478 U.S. 1020 (1986); *United States ex rel. Sliva v. Rundle*, 222 F. Supp. 774 (E.D. Pa. 1963); *but see Grace v. Butterworth*, 586 F.2d 878, 880 (1st Cir. 1978) (federal courts have jurisdiction to review state court denials of motions for new trial); *Sanders v. Sullivan*, 863 F.2d 218, 224-26 (2nd Cir. 1988) (state's failure to cure a conviction founded on credible recantation by important and principal witness exhibits sufficient state action to constitute a due process violation); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991) (newly discovered evidence bearing on a witness' credibility or directly on the defendant's guilt provides a basis for federal habeas relief if it would produce an acquittal on retrial); *Harris v. Vasquez*, 943 F.2d 930, 957 (9th Cir. 1990) (habeas relief warranted where newly discovered evidence would probably produce an acquittal), actual innocence is considered in evaluating whether a procedural default or abuse of the writ foreclose review of a constitutional claim.

Contrary to Herrera's argument, limiting review to fundamental and constitutional error does not mean that an incorrect assessment of guilt will go uncorrected. It is extremely unlikely that a prisoner could have a valid claim of innocence but be unable to attribute his erroneous conviction to a constitutional violation. As a practical matter, actual innocence can never be newly discovered evidence because a defendant normally would know whether he committed the crime of



which he is accused. The Fifth Amendment privilege against self incrimination does not entitle a defendant to withhold the exculpatory evidence of his own testimony. "Nothing in the Fifth Amendment privilege against self-incrimination entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand and testify." *Williams v. Florida*, 399 U.S. 78, 85 (1970). A defendant is entitled to the assistance of constitutionally effective counsel, whom he presumably informs of his innocence, as well as myriad constitutional protections that assure that he is not disadvantaged in establishing a reasonable doubt as to his guilt. Under these circumstances, it is "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

Because Herrera cannot claim that the evidence he now proffers was entirely unavailable at the time of trial, this case does not present a failure of process but rather reflects an attempt by Herrera to constitutionalize sandbagging by turning the trial into but a preliminary determination of guilt, subject to redetermination ten years after the first. Herrera does not explain his failure to assert his innocence at trial or to subpoena and introduce alibi testimony of family members. It is axiomatic that if, despite the overwhelming evidence to the contrary, Herrera had not committed the offense of which he stands convicted, he would have known of that fact and could have testified to this fact at trial. He also would have known of potential alibi testimony.

***B. Executive clemency is the appropriate vehicle to achieve justice where doubt as to guilt cannot result in reversal or new trial under existing legal standards.***

Historically, executive clemency has been considered the appropriate vehicle to achieve justice in situations where doubt as to guilt cannot result in reversal or new trial under existing legal standards. *See* Kobil, *The Quality of Mercy Strained, Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 624 (1991) (hereinafter Kobil); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 525-26 (1963) (hereinafter Bator). Today, all 36 states that authorize the death penalty have constitutional or statutory provisions for capital clemency. *See* Appendix B. Thus, it is apparent that executive clemency continues to be society's designated mechanism to prevent an inappropriate imposition of a death sentence. Moreover, in upholding the post-*Furman v. Georgia*, 408 U.S. 238 (1972), capital sentencing schemes of Texas, Florida, and Georgia, the Court noted that statutory or constitutional provisions existing in those states provided for capital clemency. *See Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion); *Proffit v. Florida*, 428 U.S. 242, 254 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (plurality opinion).

In Texas, the governor has the power, upon the recommendation of the majority of the Board of Pardons and Paroles, to grant reprieves, commutations of punishment, and pardons. TEX. CONST. art. IV, § 11; TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 1992). In capital cases, the board's considerations are triggered by either a request from the majority of trial officials of the convicting court, a written request of the convicted person or his or her representative setting forth all grounds upon which the application is based, or the written request of the governor. Corrections and Public Safety, 37 TEX. ADMIN. CODE §§ 143.57, 143.58 (West Supp. 1992). Moreover, the governor has the power to grant one reprieve in a capital



case for a period not to exceed thirty days without the recommendation of the board. TEX. CONST. art. IV, § 11; TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 1992).

Herrera's assertion that executive clemency does not effectively foreclose the possible execution of an actually innocent person who has been convicted and sentenced to death reflects the two principal, but unwarranted, criticisms that have been leveled against the effectiveness of the clemency mechanism. First, critics argue that the popularity of the death penalty and the corresponding pressure on politicians to uphold capital convictions account for the post-*Gregg* era drop in the number of commutations. Cobb, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L. J. 389, 893 & n.25 (1989) (hereinafter Cobb); Kobil, *supra*, at 608. Second, they argue that the effectiveness and fairness of executive clemency is undermined because clemency considerations normally are not guided or controlled by specified procedures and, thus, no due process protections adhere, and because the clemency decision is not usually subject to judicial review. These criticisms are flawed.

The decrease in commutations can be more reasonably attributed to the post-*Furman* limiting of the potential imposition of a death sentence from an extensive list of felonies to a narrow group of aggravated murders, and to the provisions for individualized sentencing and heightened reliability in assessment of death sentences, than to the popularity of capital punishment. Indeed, the individualized sentencing mandated in capital cases allows the jury to take into mitigating consideration evidence that used to provide a basis for commutation, such as evidence of reduced culpability or mental defects. The assumption that the decrease in commutations should be attributed to political pressure is unwarranted: it should not be "assume[d] that what is unexplained is invidious." *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

Moreover, it is precisely the fact that clemency considerations are neither encumbered by procedure nor subject to review that renders them the appropriate extraordinary remedy. Clemency long has been recognized as an extraordinary remedy that can be extended for virtually any reason at all. Unconstrained by evidentiary rules and procedure, the executive authority is free to grant clemency both to enhance justice and further goals unrelated to justice. *See* Kobil, *supra*, at 578-79. "It is precisely because society remains uneasy with the judicial process of criminal law enforcement that it has placed outside the courts the power to review and adjust sentences." *A Matter of Life and Death*: *Due Process Protection in Capital Sentencing Proceedings*, 90 YALE L. J. 889, 898 (1981); *see also* Cobb, *supra*, at 391 (the exercise of mercy through clemency requires that death sentences be contemplated "from a perspective external to the norms of due process, in order to satisfy the intuition that judicial norms may not always suffice in fixing a punishment as difficult as death"). Someone like Herrera, whose claim of actual innocence is undermined by the hearsay nature of his evidence, actually would benefit from the non-judicial nature of the clemency considerations and, given the internal inconsistency of his evidence as well as its inconsistency with evidence established at trial, would benefit from the fact that the decision to grant clemency is not subject to review. Executive clemency cannot effectively operate as the extraordinary remedy and yet be subject to the constraints of due process and judicial review.

## III.

## THE POST-CONVICTION REVIEW SOUGHT BY HERRERA WOULD REQUIRE AN UNWARRANTED EXPANSION OF BOTH SUBSTANTIVE AND PROCEDURAL PROTECTIONS.

Despite the myriad constitutional protections adhering to the trial and the many tiers of potential review available to a



death-sentenced inmate, Herrera seeks a rule that effectively would require the federal courts to try anew the ultimate issue in the state criminal trial--his guilt or innocence of a state offense. The rule cannot be justified. Extending the guilt-innocence inquiry beyond the factfinder's deliberations at trial and beyond the review required by *Jackson*, as proposed by Herrera, is without constitutional authority.

### *A. Post-trial consideration of guilt based on newly discovered evidence would constitute a constitutionally unwarranted usurpation of the jury's function by a reviewing court.*

Post-trial consideration of guilt based on newly discovered evidence would be a constitutionally unwarranted usurpation of the jury's function by the reviewing court. The *Jackson* standard of review was crafted by the Court to be the least intrusive means of insuring the mandate of *Winship*: that an accused is convicted only upon evidence that is sufficient to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 314, 319. The *Jackson* Court "emphasized repeatedly the deference owed the trier of fact and, correspondingly, the sharply limited nature of the constitutional sufficiency review." *Wright v. West*, ___ U.S. ___, No. 91-542, slip op. at 18 (June 19, 1992). Thus, the *Jackson* standard impinges upon jury discretion only to the extent necessary to ensure that a properly instructed jury does not convict "when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317.

Herrera now proposes that the constitutional protections be extended from assuring a rational verdict to assuring a verdict based on imaginative use of newly discovered evidence. Not only would this denigrate the jury's deliberative process to but a preliminary determination, it also would require constitutionalizing procedures far beyond the trial process actually required by the Constitution. Defendants have no

constitutional right even to have the constitutionality of their conviction reviewed on direct appeal, *Abney v. United States*, 431 U.S. 651, 656 (1977); *McCane v. Durston*, 153 U.S. 684 (1894), or collateral review. *Murray v. Giarratano*, 492 U.S. at 10. While the Constitution guarantees a defendant a trial by an impartial jury and that he shall not be deprived of life or liberty without due process of law, there simply is no constitutional authority, either direct or derivative, for a process beyond the trial to determine guilt.[20]

### *B. The scope of federal habeas review should not be extended to post-conviction claims of actual innocence based on newly asserted evidence.*

A determination of a state prisoner's "real" or "actual" guilt of a state offense based on a post-trial proffer of newly discovered evidence, independent of any causative constitutional error, is both the most intrusive and the least useful exercise that a federal habeas court could undertake. For this reason, the states must be permitted to make the final and dispositive determination of guilt or innocence.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. . . . Repose is a psychological necessity in a secure and active society, and it should be one of the aims--though . . . not the sole aim--of a procedural system to

[20] If this Court were to hold that, upon a certain threshold showing of newly discovered evidence, a death-sentenced inmate is entitled to a procedure by which he can obtain a new trial and if the state failed to provide such a procedure, the review of the constitutional deprivation that would evolve upon a federal habeas court would be tantamount to directly considering guilt.



> devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done. There comes a point where a procedural system which leaves matters perpetually open no longer reflects a humane concern but merely anxiety and a desire for immobility.

Bator, *supra* at 452-53; *see also Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (separate opinion of Harlan, J.). Under the federal system established by the Constitution, the point of federal "repose" in reviewing state convictions must come with the conclusion that the trier of fact acted rationally and that no federal constitutional violation probably caused the conviction of one who is actually innocent of the state crime. At this point, the federal interest in the state guilt-innocence determination ends, and so also should "final competence to determine legality." Bator, *supra*, at 451. To acknowledge that there is a limit on federal authority to intrude into the state criminal process is merely to recognize an inherent aspect of federalism.

> [I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved includes the right to petition this Court for writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

*Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

The Constitution's allocation of power between the states and the federal government is founded on the proposition that the states are competent to make--*i.e.*, can be trusted by the federal government to make--the final determination of this core question. "The states possess *primary authority* for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (emphasis added). As the Court more recently iterated:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. (citation omitted).

*Schad v. Arizona*, 501 U.S. at ___, 111 S.Ct. at 2500, *quoting Patterson v. New York*, 432 U.S. at 201. Not only is the criminal law an aspect of the police power[21] primarily vested in the states, but it also is a fundamental attribute of the sovereignty reserved to the states under the Constitution. The question whether an individual is guilty or innocent of a state offense is not just *a* state law question, which is outside the ambit of federal jurisdiction, but is *the* ultimate state law question at the criminal trial.

Herrera's proposed rule, thus, would constitute more than a "mere" intrusion into the state criminal process, which itself counsels the exercise of restraint and care on federal habeas review of state convictions. *Engle v. Isaac*, 456 U.S. at 128 & n.33. Rather it would amount to a usurpation of a fundamental and traditional aspect of state sovereignty,

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[21] "Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power. . . ." *Berman v. Parker*, 348 U.S. 26, 32 (1954).



substantially impinging on a "'function[] essential to separate and independent existence'" of the state criminal justice system. *See Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911), *quoting Lane County v. Oregon*, 7 Wall. 71, 76 (1869). If the final and dispositive determination of the issue of an individual's guilt of a state offense is to be made by a federal habeas court, despite the fact that the trial comported with constitutional requirements, there is no point in conducting the state trial in the first instance. The entirety of the state criminal process, representing a substantial investment of resources, would be relegated to the level of a probable cause hearing.

A rule permitting the federal courts to redetermine guilt or innocence cannot be justified on the basis that the state trial is not suited to its most basic task of reliably determining guilt or innocence or that trial processes conforming to constitutional mandates are somehow inferior to those that would be used by a federal habeas court to redetermine the issue years after the crime was committed. Society appropriately has designated the criminal trial as the proceeding in which a defendant's guilt or innocence is finally and dispositively determined. This Court has recognized that the criminal trial is and should be a "decisive and portentous event" precisely because it is "the time and place set for [the defendant] to be tried by a jury of his peers and found either guilty or not guilty." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Substantial societal resources--economic, political, moral, and judicial--have been marshalled at this one point in the criminal process to ensure that the outcome is as accurate as humanly possible. As discussed above, the Constitution itself recognizes the importance and preeminence of the trial and, accordingly, has invested the trial with numerous procedural protections designed to enhance the reliability of the outcome.

In contrast, a belated guilt-innocence determination that is made on collateral review based on newly discovered evidence is, if anything, *less* likely to ensure accuracy and reliability. As this Court has recognized, "the '"erosion of

memory" and "dispersion of witnesses" that occur with the passage of time' . . . prejudice the government and *diminish* the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. at ___, 111 S.Ct. at 1468, *quoting Kuhlmann v. Wilson*, 477 U.S. at 473 (plurality opinion) (emphasis added). Further, any so-called new evidence bearing on the question of guilt or innocence is inherently untrustworthy.

> We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.

*Taylor v. Illinois*, 484 U.S. at 414 (footnote omitted). Finally, the idea that a single federal judge is best situated to reliably adjudicate guilt is contrary to the most basic assumptions underlying the Sixth Amendment guarantee of a trial by jury: that the jury is a reliable factfinder and that the "commonsense judgment of a group of laymen" is a better protection against government oppression and arbitrary law enforcement than is reliance on judicial fiat. *Williams v. Florida*, 399 U.S. at 100.

Similarly, direct federal habeas consideration of guilt or innocence cannot be justified on the basis that the states lack an interest in the factual accuracy of the outcome of state criminal trials. Assuming the constitutionality of the process by which an individual is found guilty of a validly defined offense, as does the question presented for review, the state's interest in the integrity of its own process and in the ultimate accuracy of the determination of guilt is greater than any federal interest. As one commentator has noted:

> States have a strong interest in the accurate determination of guilt. Public outrage over an erroneous outcome, the cost of supporting a prisoner who is unjustly incarcerated, and the danger to society presented by erroneously released prisoners provides states with strong incentives to insure proper guilt determinations.



Reed, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1142-43 (1980). These incentives, which are heightened in capital cases, uniquely bear on the sovereign that is enforcing the criminal law. After all, it is the state that, within constitutional constraints, has determined that certain conduct so violates its peace and dignity that it must carry criminal sanctions. It is the state that has an interest in enforcing the substantive state criminal laws in a manner that produces convictions of the guilty and acquittals of the innocent.

Herrera, thus, merely quarrels with some of the most fundamental premises upon which the federal system and the American criminal justice system are based. Herrera's proposed rule has a certain emotional appeal because of the natural human desire for certainty, and perhaps even immobility, in cases involving the death penalty. It would attain intellectual appeal, however, only if there were in fact some entity, somewhere, that was infallible in an absolute sense, such that no one could possibly question the propriety of trusting it to make the ultimate and correct decision. That entity does not exist and will not exist until human beings either become omniscient or are removed entirely from the factfinding process. "A court cannot more than any other human agency break down the barrier between appearance and reality." Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 966 (1957). As Justice Jackson stated about this Court: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

With respect to the ultimate issue at the state trial, the question of an individual's guilt or innocence of a state offense, the Court already has struck the appropriate balance between federal and state interests and the requirements of federalism.

The federal courts can assure the rationality of the trial outcome by reviewing the sufficiency of the evidence. *Jackson v. Virginia*, 443 U.S. at 319. In addition, the Court will consider whether an alleged constitutional violation probably caused the conviction of someone who is actually innocent. *Murray v. Carrier*, 477 U.S. at 478, 496 (1986); *see also Sawyer v. Whitley*, ___ U.S. ___, No. 91-6382, slip op. at 14 (June 22, 1992). Where the conviction of an innocent person can be traced to constitutional error during the trial, both the ultimate federal responsibility for vindicating constitutional rights and the state action that violated the defendant's constitutional rights serve to justify the limited federal consideration of the question of guilt. Where there is no underlying constitutional violation, these justifications vanish, and so also should the federal authority to intrude into the state's administration of criminal justice.

## IV.

## IN ANY EVENT, A PETITIONER SHOULD BE REQUIRED TO SATISFY A HIGH THRESHOLD SHOWING BEFORE NEWLY DISCOVERED EVIDENCE RELEVANT TO GUILT IS CONSIDERED IN POST-TRIAL REVIEW.

If, despite the considerable interests militating against such consideration, the Court determines that the Eighth Amendment requirement of heightened reliability and the finality of a death sentence require consideration of claims based solely on newly discovered evidence relevant to guilt, review must be cast in terms of a constitutional violation that does not require the federal habeas court to directly adjudicate guilt or innocence. For example, direct federal adjudication of guilt or innocence of a state offense would not be required if it were determined that, upon a requisite threshold showing, a death-sentenced inmate were constitutionally entitled to a procedure by which he could obtain a new trial, such as an untimely motion for new trial.



Moreover, if a constitutional standard is formulated for consideration of newly discovered evidence relevant to guilt, the standard must be a rigorous one. Sound considerations militate in favor of limiting the constitutional protection to those petitioners who can show by clear and convincing evidence that the newly discovered evidence of actual innocence (1) was unavailable at the time of trial and at the time of all prior writs, (2) would be admissible upon retrial, and (3) is such that upon retrial no reasonable juror could find him guilty of the capital offense. This standard incorporates the unavailability and admissibility requirements of existing state and federal standards for motions for new trial.

In addition, considerations similar to the ones underlying the actual innocence standard delineated in *Sawyer v. Whitley*, ___ U.S. at ___, No 91-6382, slip op. at 14, favor imposing the burden of establishing by clear and convincing evidence that no reasonable juror could find the petitioner guilty of the offense. First, this standard assures that a defendant who has presented evidence of actual innocence at trial is not placed in a less advantageous position upon review than one who after trial claims to have just discovered evidence of his innocence. Second, it makes it less likely that a defendant, whose evidence of innocence and own credibility are suspect, will use the trial as an initial forum for testing the strength of the state's case before presenting existing evidence in a post-trial forum. Third, unhinged from the requirement of identifying a constitutional violation in the trial, a lesser burden likely would give rise to an unlimited variety of claims of innocence asserted at the last moment in an attempt to foreclose the imposition of a death sentence.

By formulating any constitutional entitlement as the right to a state procedure by which a death-sentenced inmate can seek a new trial upon meeting the requisite threshold standard for actual, as opposed to legal, innocence, the Court would properly limit those instances in which it is incumbent upon the federal habeas court to conduct such review to situa-

tions where the state fails to provide such a procedure. Unlike the review required by *Jackson v. Virginia*, which reflected an existing and fundamental right to be convicted only upon evidence sufficient to rationally support a conclusion that every element of the crime has been established beyond a reasonable doubt, the proposed review does not emanate from either a protection afforded by the Bill of Rights or one that has been determined to be essential to fundamental fairness. Thus, the Court's disinclination in *Jackson v. Virginia* to apply a *Stone v. Powell*, 428 U.S. 465 (1976), type limitation to federal habeas review should not be controlling here where the procedure is designed only to insure against the extraordinary possibility that a sentence of death will be imposed on one who is actually innocent.

Herrera's proposed standard, whether an inmate could show "a fair probability that in light of all the evidence -- including the evidence that is newly discovered -- the trier of fact would have entertained a reasonable doubt of his guilt" (brief at 44), would create a lower standard for claims of actual innocence than for claims of newly discovered evidence that are presented in a timely manner to the federal or state trial courts. It would inappropriately transform state trials into but a preliminary proceeding and provide no disincentive to sandbagging.

## V.

## A REQUIREMENT THAT STATES PROVIDE POST-TRIAL PROCEDURES FOR CONSIDERATION OF NEWLY DISCOVERED EVIDENCE WOULD BE A NEW CONSTITUTIONAL RULE BARRED UNDER *TEAGUE V. LANE*.

Finally, acceptance of Herrera's argument would require the Court to announce and apply retroactively a new rule of constitutional law. As discussed above at section I, no law in existence at the time Herrera's conviction became final arguably supports, much less dictates, the rule he seeks. Consequently,



review and relief in this collateral proceeding are foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989); *Butler v. McKellar*, 494 U.S. 407, 412-15 (1990).

The rule Herrera seeks would not come within the first *Teague* exception, which is reserved for rules that place certain primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish. *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989). These are "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." *Id.* By definition, every state prisoner comes to federal habeas court as one who is guilty, and where his trial was conducted in accord with constitutional requirements, the state's power to punish has been established by proof beyond a reasonable doubt. *See Ford v. Wainwright*, 477 U.S. at 429 (O'Connor, J., joined by White, J., concurring in part and dissenting in part) ("I consider it self-evident that once society has validly convicted an individual and therefore established its right to punish, the demands of due process are reduced accordingly").

Similarly, to the extent Herrera seeks a post-conviction procedure for relitigating the issue of guilt-innocence, despite the fact that the state trial provided him with a manifestly full, fair, and adequate opportunity for *timely* litigation of that issue, he may not benefit from application of the new rule. The second *Teague* exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 489 U.S. at 313; *see also Butler v. McKellar*, 494 U.S. at 416. Because Herrera's proposed rule itself presumes that no constitutional violation at trial produced the conviction of an innocent person, and because he seeks only post-conviction procedures, the rule is incapable of enhancing the accuracy and reliability of the trial outcome. Rather, the rule merely would encourage sandbagging at trial or relitigation of guilt or innocence in federal court, years after the crime was committed, based on stale and otherwise unreliable evidence.

As discussed *supra* at sections II and III, existing constitutional protections that apply at trial are adequate to assure the reliability of the trial outcome. In contrast, a redetermination of guilt or innocence on habeas review is likely to inject arbitrariness and unreliability into the determination; if only because of the passage of time, the redetermination is much more likely to be factually inaccurate than was the outcome of the trial. The incremental increase in protection, if there be any, simply would not constitute a bedrock rule. *Sawyer v. Smith*, 497 U.S. ___, ___, 110 S.Ct. 2822, 2832 (1990).

## VI.

## BECAUSE HERRERA'S NEWLY PRESENTED EVIDENCE IS SELF-CONTRADICTORY AND INCREDIBLE, IT CANNOT PROVIDE A BASIS FOR RELIEF.

There is no possibility in Herrera's case that an innocent man has been convicted for a crime that he did not commit. The evidence of his guilt, which the jury credited, is overwhelming. Herrera's newly presented evidence, to the contrary, is self-contradictory and unpersuasive, and could not have led to any different outcome to his trial. Thus, under the least stringent standard that could be imposed, there is no possibility that he would be entitled to relief.

### *A. Evidence of Herrera's guilt is overwhelming.*

The affidavits upon which Herrera premises his claim of innocence do not demonstrate that someone other than Herrera committed the capital murder. Both Carrisalez and the eyewitness to his murder, Enrique Hernandez, identified Herrera as the perpetrator of the capital murder, and their identifications of him, which were unequivocal, were found by every court that has considered the issue to be reliable. Hernandez saw Carrisalez' murderer outside of his car, with the headlights of the patrol car on him, for approximately fourteen



seconds from a distance of fifteen to sixteen feet, long enough to observe and remember the expression on the man's face, and he was certain that Leonel Herrera is the person who shot Carrisalez. Further, Hernandez, a trained observer, saw the car of the murderer when it first was clocked for speeding, when it paused for thirty or more seconds at the intersection, and when it stopped just before Officer Carrisalez was shot with headlights from the patrol car illuminating both the driver's side and the interior of the car. At none of those points did Hernandez ever see anyone other than Leonel Herrera in the car.[22] The nephew's affidavit, which is totally inconsistent with the testimony of the eyewitness to the offense, is simply incredible.

Herrera's newly presented evidence also does not negate his own previous actions. Herrera's written admission to both of the interrelated murders, which was produced wholly independent of any state action, was found in his hip pocket at the time of his arrest. Herrera does not challenge the authenticity of this spontaneous admission; in fact, he relied on it in his state and federal habeas petitions in an attempt to establish his claim with respect to the existence of mitigating evidence. In addition, Herrera entered a plea of guilty to the murder of Trooper Rucker. Herrera's current claim of factual innocence does not explain why, if he were innocent, he would have written the inculpatory letter or pled guilty to the murder of Trooper Rucker.

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[22] Raul Herrera, Jr., claims that he hid on the floor of the car, but the context of the affidavit makes clear that, according to his version of events, he did so only *after* his father allegedly fired the shots at the officer. Thus, the nephew's affidavit does not explain why only one person was seen in the car at the time it was clocked for speeding, at the time it paused at the red light, and at the time it was actually stopped. It also does not suggest that Chavello Lopez, the third person who allegedly was in the car with the nephew and his father, *ever* ducked down out of sight. Consequently, even if Raul Herrera, Jr., had gone down on the floorboard, as he now says he did, Hernandez still would have seen at least one other person in the car.

Further, Herrera's newly presented evidence does not explain the physical evidence that tied him to the murder of Trooper Rucker. It does not explain how, if his brother had commited the crime, his own Social Security card would have been found within seven feet of trooper Rucker's body ten or fifteen minutes before any law enforcement officers arrived on the scene. Even if Herrera normally kept his Social Security card in the glove compartment of the car, as Villareal now claims Raul, Sr., informed him eight years ago, the newly presented evidence does not explain how the card came to be found beside the body, while other personal papers belonging to Herrera remained in the glove compartment undisturbed. It is, of course, not unusual to keep one's Social Security Card in one's wallet. The presence of Herrera's card on the scene of Rucker's murder is entirely consistent with the drop of Type A blood, consistent with that of Trooper Rucker and inconsistent with Herrera's blood type, that had dropped onto Herrera's wallet. Even Herrera cannot contend that Raul, Sr., was in possession of the wallet. There was similar blood, which Herrera also has not attempted to explain, on blue jeans that belonged to him. Moreover, the keys to his car, which indisputably was the one used by the person who murdered Officer Carrisalez and Trooper Rucker, were in the pocket of those jeans. The blood inside Herrera's wallet, the blood on his jeans, his possession of the keys to the vehicle, and the presence of his Social Security card beside Trooper Rucker's body, all are totally inconsistent with Herrera's innocence. His current affidavits do nothing to negate this extremely damning evidence.

### *B. Herrera's newly discovered evidence is incredible.*

While the record is replete with compelling evidence of Herrera's guilt of the capital murder of which he was convicted, there is no competent evidence before this Court to demonstrate that Raul Herrera, Sr., or anyone other than Leonel Herrera committed the capital murder of Officer Carrisalez. Herrera's current claim of innocence relies upon affidavits that are wholly



inconsistent with the testimony that was presented at Herrera's trial, the physical evidence in the case, and Herrera's own admissions. Finally, and perhaps of greatest significance, the only two of Herrera's affidavits that provide any details are so inconsistent with each other that they cannot be given credence.

As noted in the Statement of the Case, *supra*, at 14-15, the affidavits upon which Herrera bases his claim of innocence contradict each other with respect to the number and identity of the people in the car with Raul Herrera, Sr., at the time he allegedly murdered the two law enforcement officers. They also are totally inconsistent with each other in the manner in which they describe the sequence of events, and even with respect to the direction in which Raul Herrera was allegedly traveling at the time. Further, the affidavits are in conflict with affidavits from family members who were in a position to provide an alibi for Herrera, but who failed to do so even though they previously had proffered affidavits in support of Herrera's federal habeas claims.

Because the assertions upon which Herrera now relies come from family members and close friends, there is no apparent explanation for his wait of ten years before claiming "innocence" and an alibi defense. Raul, Jr.'s, affidavit indicates that Raul, Sr., used Herrera's car to commit the murders. If Herrera's relatives had access to this car, as the nephew now indicates, it is inconceivable that, once Herrera was arrested for the murders of Rucker and Carrisalez, he did not question his relatives about these circumstances or tell his trial attorney (who is now deceased) about this crucial piece of potentially exculpatory information. Even if Herrera had been unwilling to point the finger at the person who allegedly had used his car to commit the offense, the affidavits on which he now relies would suggest that he was asleep in his sister's house on the night of the offense and therefore had an alibi defense. He failed to develop any such defense at trial, or to mention it in any fashion in any court for more than ten years after he was convicted. Herrera's failure to develop this evidence in a timely fashion,

when it could properly be evaluated by a jury, casts doubt on its authenticity now.[23] Much more compelling evidence should be required for an eleventh-hour claim to justify a stay of execution, much less habeas corpus relief.

## CONCLUSION

For the above reasons, the Director requests that the judgment of the court below be affirmed.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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[23] The record demonstrates that, at each point in the process, as Herrera has seen the flaws in his current pleading, he has added new allegations and tried to mold his arguments so that he will be granted relief. When Herrera initially raised his claim of actual innocence in the state court, he relied on hearsay affidavits. When the courts properly found those affidavits to be incompetent evidence, he filed an affidavit in federal habeas court in which Raul Herrera, Jr., made assertions in an attempt to establish the factual innocence of Leonel Herrera. When it became clear that the courts would not provide relief on the basis of a claim of factual innocence, Herrera recast his claim in an attempt to fit it within the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). His first mention of the allegation that police officers had threatened family members during Herrera's trial was made -- without evidentiary support -- on February 18, 1992, the eve of his execution, in a footnote to his motion pursuant to Rule 59(e) to amend the district court's original order on his second federal habeas petition. Only after it became clear that the courts would not accept a conclusory and unsubstantiated *Brady* claim did Herrera produce a second affidavit of Raul Herrera, Jr., in which he suggests -- for the first time -- that law enforcement officers visited his home during Leonel Herrera's trial and threatened his family that they should not expose drug dealing by law enforcement agencies. This affidavit was executed on February 17, 1992, and therefore was available at the time Herrera filed his Rule 59(e) motion with the federal district court, but Herrera did not present it. Only after the Fifth Circuit vacated the district court's stay of execution and denied habeas relief did Herrera produce this affidavit. The gamesmanship Herrera has exhibited in raising his claim of "innocence" ten years after his trial casts doubt on the veracity of his evidence.



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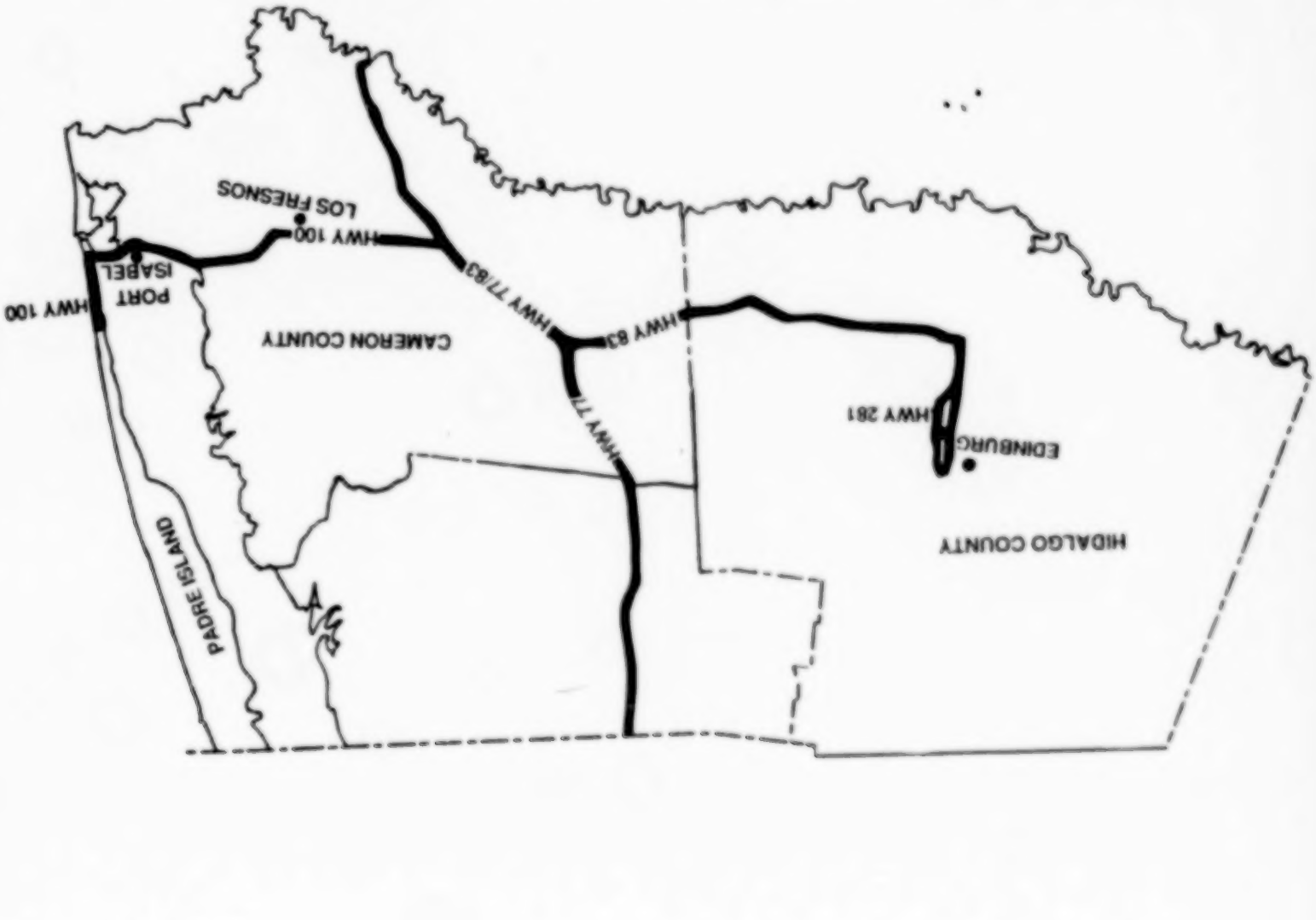
**APPENDIX A**


LOS FRESNOS
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PORT ISABEL
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CAMERON COUNTY
HWY 77/83
HWY 83
HWY 77
HWY 281
EDINBURG
HIDALGO COUNTY
PADRE ISLAND

# APPENDIX B

# SURVEY OF PROCEDURES TO CONSIDER NEWLY DISCOVERED EVIDENCE AND EXECUTIVE CLEMENCY[1]

[1] The information in this appendix cannot be considered exhaustive but is as thorough as possible in light of the time constraints under which it has been prepared. For the sake of brevity, portions of some statutory provisions have been summarized rather than quoted directly.

## FEDERAL SYSTEM

### Motion for New Trial

Fed. R. Crim. P. 33 - A motion for new trial based on newly discovered evidence must be presented within 2 years of final judgment. A motion for new trial based on other grounds shall be made within 7 days after verdict or finding of guilty.

### Post-Conviction Remedies

28 U.S.C. § 2255 - Motion may be made at any time.

### Procedures for Pardon, Commutation, or Clemency

Constitution of the United States, Art. II §2

## ALABAMA

### Motion for New Trial

Ala. R. Crim. P. 24.1 - Must be filed no later than thirty days after sentence is pronounced.

### Post-Conviction Remedies

Ala. R. Crim. P. 32.1(e) - A defendant may institute a proceeding in the court of original conviction to secure appropriate relief on the ground, *inter alia*, that newly discovered material facts exist which require that the conviction or sentence be vacated by the court because:

(1) The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post-trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;



(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.

Ala. R. Crim. P. 32.2(c) - The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six months after the discovery of the newly discovered material facts, whichever is later.

### Procedures for Pardon, Commutation, or Clemency

Constitution of Alabama, Art. V, § 124

## ALASKA

### Motion for New Trial

Alaska R. Crim. P. 33 - A motion for a new trial based on newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

### Post-Conviction Remedies

Alaska R. Crim. P. 35.1(a)(4) - Relief is available upon a claim that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

**Standard for Newly Discovered Evidence**

A motion for a new trial based on newly discovered evidence must meet the following requirements: (1) it must appear from the motion that the evidence relied on is, in fact, newly discovered, *i.e.*, discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issues involved; and (5) the evidence must be such as, on a new trial, would probably produce an acquittal. *Rank v. State*, 382 P.2d 760, 761 (Alaska 1963).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Alaska, Art. III, § 21

## ARIZONA

**Motion for New Trial**

Ariz. R. Crim. P. 24.2(a)(2) - Upon motion made no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment on the ground, *inter alia,* that newly discovered material facts exist, under the standards of Rule 32.1.

**Post-Conviction Remedies**

ARIZ. REV. STAT. ANN. § 13-4231 *et seq.* (1989) - Contains no time limitation.

ARIZ. REV. STAT. ANN. § 13-4231(5) - Grounds for relief include the existence of newly discovered evidence. The court is to consider whether the new facts, if introduced, would have changed the verdict or sentence; whether the petitioner exercised diligence to discover and produce the evidence at



trial; and whether the petitioner commenced a proceeding promptly after discovery of these facts.

Ariz. R. Crim. P. 32.1(e) - Any person who has been convicted of, or sentenced for, a criminal offense may institute a proceeding to secure appropriate relief on the ground, *inter alia,* that newly-discovered material facts exist which may require that the conviction or sentence be vacated. The court is to consider:

(1) The probability that such facts, if introduced would have changed the verdict, finding or sentence;

(2) The diligence which would have been required to discover and produce the evidence at trial;

(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Arizona, Art. 5, § 5

## ARKANSAS

**Motion for New Trial**

Ark. R. Crim. P. 36.22 - A convicted person may file a motion for new trial, but all motions must be filed prior to the time fixed to file a notice of appeal.

ARK. CODE ANN. §16-89-130 (Michie 1987) -

(b) The application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment.

(c)(6) The court in which a trial is had upon an issue of fact may grant a new trial when a verdict is rendered against the convicted person by which his substantial rights have been prejudiced, upon the ground, *inter alia,* that the convicted

person has discovered important evidence in his favor since the verdict.

ARK. CODE ANN. §16-91-105 -

(a)(1) A notice of appeal must be filed within 30 days from the date of the sentence and entry of judgment.

(b)(1) Prior to the time fixed to file a notice of appeal, a convicted person may file a motion for new trial or any other application for relief.

(b)(5) Upon the filing of any motion or other application for relief in the trial court, the time to file a notice of appeal shall not expire until 30 days after the disposition of all motions or applications.

**Post-Conviction Remedies**

R. Crim. Pro. 37.2(c) - A petition must be filed within 60 days from the date mandate issued by the appellate court or within 90 days from entry of judgment if the conviction was obtained upon a plea of guilty.

**Standard for Newly Discovered Evidence**

R. 37.2 requires a convicted person to bring any claim for collateral review of his conviction "within [60 days] of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void." *Henderson v. Sargeant,* 926 F.2d 706, 709 (8th Cir. 1991).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Arkansas, Art. V §11



## CALIFORNIA

**Motion for New Trial**

CAL. PENAL CODE §1181(8) (West 1982) - When a verdict has been rendered against the convicted person, the court may, upon his application, grant a new trial, *inter alia,* when new evidence is discovered material to the convicted person, which he could not, with reasonable diligence, have discovered and produced at trial.

**Post-Conviction Remedies**

CAL. PENAL CODE §1473(d)

**Standard for Newly Discovered Evidence**

In order to warrant habeas corpus relief, new evidence must be such as to undermine the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact. *In Re Pratt,* 112 Cal. App. 3d 795, 796 (1980).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of California, Art. V, § 8

## COLORADO

**Motion for New Trial**

Colo. R. Crim. P. 33(c) - A motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the

convicted person; if a review is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

COLO. REV. STAT. ANN. §16-5-402(1) (West 1990) - No time limitation is placed upon the period within which a person may collaterally attack his conviction for a class one felony.

R. Crim. P. 35(c)(2)(V) - Relief may be granted if there exists evidence of material facts, not heretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the convicted person or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

R. Crim. P. 35(c)(3) - The motion may be filed at any time.

COLO. REV. STAT. ANN. § 18-1-410(1)(e) - Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for post-conviction review. To justify a hearing, an application for post-conviction review must, in good faith, allege, *inter alia,* that there exists evidence of material facts, not heretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the convicted person or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

**Standard for Newly Discovered Evidence**

For a motion for new trial based on newly discovered evidence to succeed, the moving party must establish: (1) that the evidence was discovered after the trial, and defendant and his



counsel exercised diligence to discover all evidence favorable to defendant prior to and during the trial; (2) that the evidence is material to the issues involved and is not merely cumulative or impeaching; and (3) that on retrial the newly discovered evidence would probably produce an acquittal. *People v. Jones,* 690 P.2d 866, 869 (Colo. Ct. App. 1984).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Colorado, Article 4, § 7

## CONNECTICUT

**Motion for New Trial**

CONN. GEN. STAT. ANN. § 52-270(a) (West 1991) - The superior court may grant a new trial of any action that may come before it, for the discovery of new evidence according to the usual rules in such cases.

CONN. GEN. STAT. ANN. § 52-582 - No petition for a new trial in any civil or criminal proceeding shall be brought more than three years after the rendition of the judgment or decree.

**Post-Conviction Remedies**

CONN. GEN. STAT. ANN. § 52-466 (West 1991) - Contains no time limitation.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Connecticut, Art. 4, § 13

## DELAWARE

### Motion for New Trial

Del. Superior Court Crim. R. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending, the court may grant the motion only on remand of the case.

### Post-Conviction Remedies

Del. Superior Court Crim. R. 61 -

(i)(1) A motion for post-conviction relief may not be filed more than three years after the judgment of conviction is final.

(i)(5) The time limitation shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

Common Law Writ of Coram Nobis is also available.

### Standard for Newly Discovered Evidence.

Before granting a new trial based on newly discovered evidence, the evidence must meet the following three criteria: (1) the new evidence must be of such a nature that it would have probably changed the result if presented to the jury; (2) the evidence must have been newly discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and (3) the evidence must not be merely cumulative or impeaching. *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987); *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. Ct. 1974).



### Procedures for Pardon, Commutation, or Clemency

Constitution of Delaware, Article VII, § 1

## FLORIDA

### Motion for New Trial

Fla. R. Crim. P. 3.590(a) - A motion for new trial may be made within ten days after the rendition of the verdict or the finding of the court.

Fla. R. Crim P. 3.600(a)(3) - The court shall grant a new trial on the ground, *inter alia*, that there exists new and material evidence which, if introduced at the trial, would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at trial.

### Post-Conviction Remedies

Fla. R. Crim. P. 3.850, Para. 2(1) - A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges, *inter alia*, that the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence.

### Standard for Newly Discovered Evidence

To warrant granting of a new trial based on newly discovered evidence, it must appear that the new evidence was discovered after the former trial, that due diligence was exercised to obtain and present it at the former trial, and that it is material to the issue. It must go to the merits of the case, must not be cumulative, and must be such as would produce a different verdict.

*O'Bryan v. State*, 300 So.2d 323, 324-25 (Fla. Dist. Ct. App. 1974).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Florida, Art. 4, § 8

## GEORGIA

**Motion for New Trial**

GA. CODE ANN. § 5-5-23 (1990) - A new trial may be granted in any case where any material evidence is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial.

GA. CODE ANN. § 5-5-40 -

(a) All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury.

(f) Motions for new trial in cases in which the death penalty is imposed shall be given priority.

GA. CODE ANN. § 5-5-41 -

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled, or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.



**Standard for Newly Discovered Evidence**

The requirements for granting an extraordinary motion for new trial based on newly discovered evidence, incumbent on the movant to prove, include: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness. *Dick v. State*, 287 S.E.2d 11, 13-14 (Ga. 1982).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Georgia, Art. IV, § II, Para. II

## HAWAII

**Motion for New Trial**

HAW. REV. STAT. § 635-56 (1985) - The court may grant a new trial for any legal cause.

HAW. R. PENAL P. 33 -

The court may grant a new trial if required in the interest of justice. A motion for new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period.

Haw. R. Crim. P. 59 -

(a) A new trial may be granted to all or any of the parties and on all or part of the issues: (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for

any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the State.

(b) A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Haw. R. Crim. P. 60(b)(2) - On motion and upon such terms as are just, the court may relieve a party from a final judgment where, *inter alia*, there exists newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

**Standard for Newly Discovered Evidence**

A motion for new trial based on newly discovered evidence will only be granted if: (1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for purposes of impeachment; and (4) the evidence is of such nature as would probably change the result of a later trial. *State v. Caraballo*, 62 Haw. 309, 615 P.2d 91 (1980).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Hawaii, Article V, § 5, Para. 2

## IDAHO

**Motion for New Trial**

IDAHO CODE § 19-2406(7) (1987) - The court may grant a new trial, *inter alia*, when new evidence is discovered material to the defendant which he could not with reasonable diligence have discovered and produced at trial.



IDAHO CODE § 19-2407 (1991) - The application for a new trial may be made before or after judgment; it must be made within fourteen days after verdict, unless the court or judge extends the time.

**Post-Conviction Remedies**

IDAHO CODE § 19-4901(a)(4) (1987) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

IDAHO CODE § 19-4902 - Application is to be filed within five years from the expiration of the time for appeal or the determination of an appeal or from the determination of a proceeding following an appeal.

IDAHO CODE § 19-2719(3) - In a capital case, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known within forty-two days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed.

**Standard for Newly Discovered Evidence**

A motion for a new trial based on newly discovered evidence must disclose: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *Cunningham v. Idaho*, 788 P.2d 243, 244 (Idaho Ct. App. 1990).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Idaho, Art. 4, § 7

# ILLINOIS

## Motion for New Trial

ILL. ANN. STAT. ch. 38, para. 116-1(b) (Smith-Hurd 1983) - A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict.

## Post-Conviction Remedies

ILL. ANN. STAT. ch. 38, para. 122-1 *et seq.* - Contains no explicit provision for newly discovered evidence.

ILL. ANN. STAT. ch. 38, para. 122-1 - No proceedings shall be commenced more than 3 years after rendition of final judgment, unless petitioner alleges facts showing that the delay was not due to his culpable negligence. (The 3-year period is effective Jan. 1, 1992; the prior statute provided for 10 years.)

ILL. ANN. STAT. ch. 110, para. 2-1401 -

(a) Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished.

(c) The petition for relief from judgment must be filed not later than 2 years after the entry of the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

## Procedures for Pardon, Commutation, or Clemency

Constitution of Illinois, Article V, § 12



# INDIANA

## Motion for New Trial

Ind. Rule PC 2 - Provides for a belated motion to correct error and belated appeal.

Ind. R. Crim. P. 16 -

(A) A motion to correct error is not a prerequisite for appeal, except when a party seeks to address newly discovered material evidence capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial.

(B) A motion to correct error shall be filed within thirty (30) days following the date of sentencing in a cause. Trial Rule 59 (Motion to Correct Error) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by the Indiana Supreme Court for the conduct of criminal procedure.

Ind. Trial R. 59 -

(A)(1) A motion to correct error is not a prerequisite for appeal, except when a party seeks to address, *inter alia*, newly discovered material evidence capable of production within thirty (30) days after the entry of a final judgment or an appealable final order.

(C) The motion to correct error, if any, shall be filed not later than thirty (30) days after the entry of a final judgment or an appealable final order.

## Post-Conviction Remedies

Ind. Rule PC 1, Sec. 1(a)(4) - Relief is available for a person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Indiana, Art. 5, § 17

## IOWA

**Motion for New Trial**

Iowa R. Crim. P. 23(2) -

(a) The application for a new trial can be made only by the defendant and shall be made not later than 45 days after plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction may be rendered, but in any case not later than five days before the date set for pronouncing judgment, but where based upon newly discovered evidence may be made after judgment as well.

(b)(8) The court may grant a new trial when the defendant has discovered important and material evidence in his or her favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial. A motion based upon this ground shall be made without unreasonable delay and, in any event, within two years after final judgment, but such motion may be considered thereafter upon a showing of good cause.

**Post-Conviction Remedies**

IOWA CODE ANN. § 663A.2(4) (West 1987) - The remedy applies to a claim that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

IOWA CODE ANN. § 663A.3 - The application must be filed within 3 years of the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. This time limitation does not apply to a ground of fact



or law that could not have been raised within the applicable time period.

**Standard for Newly Discovered Evidence**

The defendant must show: (1) the evidence was discovered after trial and before judgment; (2) it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *Lawson v. Iowa,* 280 N.W.2d 400, 405 (Iowa 1979).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Iowa, Art. 4, § 17

## KANSAS

**Motion for New Trial**

KAN. CRIM. PROC. CODE ANN. §22-3501(1) (Vernon 1983) - A motion for a new trial based on the ground of newly discovered evidence may be made within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

KAN. CIV. PROC. CODE ANN. § 60-1507 - Contains no explicit provision for newly discovered evidence.

KAN. CIV. PROC. CODE ANN. § 60-1507(a) - The prisoner may move for relief at any time.

**Standard for Newly Discovered Evidence**

The granting of a new trial for newly discovered evidence is in the trial court's discretion. A new trial should not be granted on the ground of newly discovered evidence unless the evidence is of such materiality that it would be likely to produce a different result upon re-trial. The credibility of the evidence offered in support of the motion is for the trial court's consideration. The burden of proof is on defendant to show the alleged newly discovered evidence could not with reasonable diligence have been produced at trial. The newly discovered evidence should change the outcome of the case. *State v. Hobson,* 697 P.2d 1274, 1275-76 (Kan. 1985).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Kansas, Art. I, § 7

## KENTUCKY

**Motion for New Trial**

Ky. R. Crim. P. 10.02(1) - Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice.

Ky. R. Crim. P. 10.06(1) - A motion for a new trial based upon the ground of newly discovered evidence shall be made within one year after the entry of the judgment or at a later time if the court for good cause so permits.

**Post-Conviction Remedies**

Ky. R. Crim. P. 11.42(1) - A prisoner in custody under sentence or a defendant on probation, parole, or conditional discharge who claims a right to be released on the ground that the



sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.

**Standard for Newly Discovered Evidence**

Generally, it is essential that a motion for a new trial based on newly discovered evidence be supported by the affidavits of the accused, his counsel, and the new witnesses. The rule is that in order for newly discovered evidence to support a motion for new trial in a criminal case it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted. *Wheeler v. Commonwealth,* 395 S.W.2d 569, 571-72 (Ky. 1965).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Kentucky, § 77

## LOUISIANA

**Motion for New Trial**

LA. CODE CRIM. PROC. ANN. art. 851(3) (West 1989) - The court, on motion of the defendant, shall grant a new trial whenever new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

LA. CODE CRIM. PROC. ANN. art. 853 - The motion for a new trial under Article 851(3) may be filed within one year after verdict or judgment of the trial court, although a sentence has been imposed or a motion for a new trial has been previously

filed; if an appeal is pending the court may hear the motion only on remand of the case.

LA. CODE CRIM. PROC. ANN. art. 854 - A motion for a new trial under Article 851(3) shall contain sworn allegations of fact showing:

(1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial;

(2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence;

(3) The facts which the witnesses or evidence will establish; and

(4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available.

The newly discovered whereabouts or residence of a witness do not constitute newly discovered evidence.

**Post Conviction Remedies**

LA. CODE CRIM. PROC. ANN. art. 924 *et seq.* - Contains no time limitation and no explicit provision for newly discovered evidence.

**Standard for Newly Discovered Evidence**

The court is required to grant a new trial whenever new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict of guilty. Neither the appellate nor supervisory jurisdiction of the Supreme Court may be invoked to review the refusal to grant a new trial, except for error of law. Great weight must be attached to the exercise of the trial judge's discretion, which should not be disturbed on review if reasonable men could differ as to the propriety of the trial judge's action. *State v. Robicheaux*, 412 So.2d 1313, 1318 (La. 1982).



**Procedures for Pardon, Commutation, or Clemency**

Constitution of Louisiana, Art. 4, § 5(E)

## MAINE

**Motion for New Trial**

Me. R. Crim. P. 33 - Any motion for a new trial based on the ground of newly discovered evidence may be made only before, or within 2 years after, entry of the judgment in the criminal docket.

**Post-Conviction Remedies**

ME. REV. STAT. ANN. tit. 15, § 2121 (West 1980) *et seq.*- Contains no time limitation and no explicit provision for newly discovered evidence.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Maine, Article V, part 1, § 11

## MARYLAND

**Motion for New Trial**

Md. R. Crim. P. 4-331 -

(a) On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

(c) The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) in the District Court, on motion filed within one year after its imposition of sentence if an appeal has not been perfected;

(2) in the circuit courts, on motion filed within one year after its imposition of sentence or its receipt of a mandate issued by the Court of Appeals or the Courts of Special Appeals, whichever is later.

**Post-Conviction Remedies**

MD. CODE ANN., CRIM. LAW § 645A - Contains no time limitation and no explicit provision for newly discovered evidence.

**Standard for Newly Discovered Evidence**

The standard used falls between "probable," which is less demanding than "beyond a reasonable doubt," and "might" which is less stringent than probable. This standard is: the newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected. *Yorke v. State,* 556 A.2d 230, 235 (Md. 1989).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Maryland, Article II, § 20

## MASSACHUSETTS

**Motion for New Trial**

Mass. R. Crim. P. 30(b) - The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done.



**Post-Conviction Remedies**

Mass. R. Crim. P. 30(a) - Contains no time limitation.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Massachusetts, Art. VIII

## MICHIGAN

**Motion for New Trial**

Mich. Court Rule 6.431 -

(A)(1) A motion for a new trial may be filed within 42 days after entry of the judgment.

(B) On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.

**Post-Conviction Remedies**

Mich. Court Rule 6.502(A) - The request for relief must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

Mich. Court Rule 6.508(D)(3) - The defendant has the burden of establishing entitlement to the relief requested, and the court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates:

(a) good cause for failure to raise such grounds earlier; and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

**Standard for Newly Discovered Evidence**

It must be shown that the evidence itself, not merely its materiality, was newly-discovered; that it is not cumulative; that it is such as to render a different result probable on a retrial of the cause; and that the party could not with reasonable diligence, have discovered and produced it at trial. *Michigan v. Barbara,* 255 N.W.2d 171, 174 (Mich. 1977).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Michigan, Art. 5, § 14

## MINNESOTA

**Motion for New Trial**

Minn. R. Crim. P. 26.04, Subd. 1 -

(1) Para. 5 - The court on written motion of the defendant may grant a new trial on the ground that there exists material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial.

(3) Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty.



**Post-Conviction Remedies**

MINN. STAT. ANN. § 589 (West 1988) *et seq.* - Contains no time limitation and no explicit provision for newly discovered evidence.

**Standard for Newly Discovered Evidence**

Granting a new trial for newly discovered evidence is a matter of discretion with the trial court, and the inquiry of the supreme court is not whether a new trial might properly have been granted by the district court but whether refusal to grant a new trial involved a violation of a clear legal right or a plain abuse of discretion. It must be shown that the evidence could not have been discovered before trial by due diligence and that the newly discovered evidence at the time of trial was not within the knowledge of the accused or is not merely cumulative. It must also be shown that, in the event of a new trial, the newly discovered evidence will probably produce a different or more favorable result. *State v. Klotter,* 142 N.W.2d 568, 572 (Minn. 1966).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Minnesota, Art. 5, § 7

## MISSISSIPPI

**Motion for New Trial**

MISS. CODE ANN. § 99-17-47 (1973) - Every new trial granted shall be on such terms as the court shall direct. No more than two new trials shall be granted to the same party in any cause.

MISS. UNIFORM CRIM. R. CIR. CT. PR. 5.16(3) (1979) -
The court may grant a new trial where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner by diligence of counsel. The motion must be made before adjournment of the term of court in which the defendant was convicted, except where the court enters an order retaining jurisdiction.

**Post-Conviction Remedies**

MISS. CODE ANN. § 99-39-5(1)(e) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

MISS. CODE ANN. § 99-39-5(2) - A motion for relief shall be made within 3 years after the time in which the prisoner's direct appeal is ruled upon by the supreme court or, if no appeal is taken, within 3 years after the time for taking an appeal has expired, or in the case of a guilty plea, within 3 years after entry of the judgment of conviction. Exception to the time limitation is made where petitioner has evidence, not reasonably discoverable at the time of trial, which is of such a nature that it would be practically conclusive that had such been introduced it would have caused a different result in the conviction or sentence.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Mississippi, Art. 5, § 124

## MISSOURI

**Motion for New Trial**

Ch. 547, §§ 547.010-547.030



§ 547.030 - The motion must be filed before judgment and within 4 days of verdict. The time for filing can be extended for a period of 30 days but no longer.

Mo. R. Crim. P. 29.11(b) - A motion for new trial based on newly discovered evidence must be filed within 15 days after return of verdict, and the trial court can extend the time for one additional period not to exceed 10 days, if the defendant so requests within 15 days after the verdict.

**Post-Conviction Remedies**

Mo. R. Crim. P. 29.15(b) - If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections.

**Procedures for Pardon, Commutation, or Clemency**

Mo. Constitution Article IV, § 7

## MONTANA

**Motion for New Trial**

MONT. CODE ANN. § 46-16-702(2) (1991) - The motion for a new trial must be filed within 30 days following a verdict or finding of guilty.

**Post-Conviction Remedies**

MONT. CODE ANN. § 46-21-104 *et seq.* - Contains no explicit provision for newly discovered evidence.

MONT. CODE ANN. § 46-21-102 - A petition may be filed at any time within 5 years of the date of the conviction.

**Standard for Newly Discovered Evidence**

The requirements governing application for a new trial based on the ground of newly discovered evidence include: (1) that the evidence must have come to the knowledge of the applicant since the trial; (2) that it was not through want of diligence that it was not discovered earlier; (3) that it is so material that it would probably produce a different result upon another trial; (4) that it is not cumulative merely -- that is, does not speak as to facts in relation to which there was evidence at the trial; (5) that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and (6) that the evidence must not be such as will only tend to impeach the character or credit of a witness. Exceptions exist where, for example, the cumulative evidence may be so overwhelmingly convincing as to compel the conclusion that to sustain the verdict would be a gross injustice, or the impeaching evidence may demonstrate perjury in the witnesses upon whose evidence the verdict is founded. *State v. Miller*, 757 P.2d 1275, 1289 (Mont. 1988); *State v. Greeno*, 342 P.2d 1052, 1055 (Mont. 1959).

In order to override the five year limitation on post-conviction relief, the defendant must prove that he has been the victim of an unjust conviction which has resulted in his unlawful detention. *State v. Perry*, 758 P.2d 268, 272-73 (Mont. 1988).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Montana, Art. VI, § 12



## NEBRASKA

**Motion for New Trial**

NEB. REV. STAT. § 29-2101(5) (1989) - A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for reasons affecting materially his substantial rights, which includes the existence of newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

NEB. REV. STAT. § 29-2103 - The district court may set aside a sentence and grant a new trial if the motion is filed within a reasonable time after the discovery of the new evidence; however, the motion must be filed within three years after the date of the verdict. This motion is the exclusive method and procedure for reviewing criminal cases after the expiration of the term in which the verdict is rendered.

**Post-Conviction Remedies**

NEB. REV. STAT. § 29-3001 *et seq.*- Contains no time limitation and no explicit provision for newly discovered evidence.

**Standard for Newly Discovered Evidence**

The motion for new trial based upon newly discovered evidence must be made within a reasonable time after discovery of the new evidence and within three years of the date of the verdict. This motion is the exclusive exception to the general rule that a motion for new trial must be filed within ten days of the verdict. The newly discovered evidence must be competent, material, credible, and might have changed the result of the trial and which by the exercise of due diligence could not have been discovered and produced at the trial. Accordingly, the new evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. *State v. Seger*, 217 N.W.2d 828, 830 (Neb. 1974).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Nebraska, Article IV, § 13

## NEVADA

**Motion for New Trial**

NEV. REV. STAT. ANN. § 176.515 (Michie 1991) -

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

3. A motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

Exception: where a prisoner who has been sentenced to death discovers new evidence tending to prove that his conviction was illegally obtained, the evidence may be brought before the court in a petition for writ of habeas corpus after the two-year time limit has run. *Snow v. State*, 779 P.2d 96, 97 (Nev. 1989)

**Post-Conviction Remedies**

NEV. REV. STAT. ANN. § 177.315 *et seq*. (expires Jan. 1, 1993, if a Senate resolution is ratified by the people of the state in the general election of 1992).

NEV. REV. STAT. ANN. § 177.315(3) - Unless there is good cause for delay, a proceeding must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken, within 1 year after the final appellate decision.

NEV. REV. STAT. ANN. § 34.725 - A petitioner may not file a petition for a writ of habeas corpus unless he previously filed a petition for post-conviction relief or demonstrates good cause for the failure to file a petition and actual prejudice.



NEV. REV. STAT. ANN. § 34.800 -

1. A petition may be dismissed if delay in the filing of the petition:

(a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred; or

(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.

2. A period exceeding 5 years between the filing of a judgment of conviction and the filing of a petition for a writ of habeas corpus creates a rebuttable presumption of prejudice to the state.

NEV. REV. STAT. ANN. § 34.810(3) - The petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Nevada, Art. 5, § 14

## NEW HAMPSHIRE

**Motion for New Trial**

N.H. REV. STAT. ANN. § 526:1 (1983) - A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable.

N.H. REV. STAT. ANN. § 526:4 - A new trial shall not be granted unless the petition is filed within three years after the rendition of the judgment.

**Standard for Newly Discovered Evidence**

The granting or denial of a new trial is in the discretion of the trial court. The guidelines for the exercise of this discretion include: (1) that the moving party was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible, material to the merits, and not cumulative; and (3) that it must be of such a character that a different result will probably be reached upon another trial. *State v. Cote,* 530 A.2d 775, 781-82 (N.H. 1987).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of New Hampshire, Pt. 2, Art. 52

## NEW JERSEY

**Motion for New Trial**

N.J. Court R. 3:20-2 - A motion for a new trial based on the ground of newly discovered evidence may be made at any time; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

N.J. Court R. 3:22-4 - Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds: (a) that the ground for relief not previously asserted could



not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

N.J. Court R. 3:22-12 - A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was not due to defendant's excusable neglect.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of New Jersey, Art. 5, § 2, Para. 1

## NEW MEXICO

**Motion for New Trial**

N.M. R. Crim. P. 5-614(C) - A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two years thereafter; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

N.M. STAT. ANN. § 31-11-6 (Michie 1984) - Contains no explicit provision for newly discovered evidence.

N.M. STAT. ANN. § 31-11-6(A) - The motion for relief may be made at any time.

N.M.R.Crim.P. 5-802 - Procedures for habeas corpus petition.

N.M.R.Crim.P. 5-802 prevails over N.M. Stat. Ann. § 31-11-6 if there is a conflict between the two in a post-conviction writ for retrial. *State v. Garcia,* 680 P.2d 613, 616 (N.M.Ct. App. 1984).

**Standard for Newly Discovered Evidence**

The newly-discovered evidence must fulfill all of the following requirements: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it could not have been discovered before the trial by the exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Shirley,* 713 P.2d 1, 3 (N.M. Ct. App. 1985).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of New Mexico, Art. V, § 6

## NEW YORK

**Post-Conviction Remedies**

N.Y. CRIM. PROC. LAW § 440.10 *et seq.* (McKinney 1983) - Contains no time limitation. Applies to all forms of post-conviction relief, including motions for new trial.

N.Y. CRIM. PROC. LAW § 440.10(1)(g) - Grounds for relief include that new evidence has been discovered since the entry of a judgment, which could not have been produced by the defendant at trial even with due diligence on his part, and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based on the ground must be made with due diligence after the discovery of such alleged new evidence.



**Procedures for Pardon, Commutation, or Clemency**

Constitution of New York, Art. IV, § 4

## NORTH CAROLINA

**Motion for New Trial**

N.C. GEN. STAT. § 15A-1414 - Characterized as a "motion for appropriate relief," it must be made within 10 days after verdict.

**Post-Conviction Remedies**

N.C. GEN. STAT. § 15A-1415(a) - A petition may be filed at any time after verdict.

N.C. GEN. STAT. § 15A-1415(b)(6) - Grounds which the defendant may assert by motion made more than 10 days after entry of judgment include that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

**Standard for Newly Discovered Evidence**

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that: (1) the witness will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *State v.*

*Britt*, 360 S.E.2d 660, 664 (N.C. 1987); *State v. Person*, 259 S.E.2d 867, 870 (N.C. 1979).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of North Carolina, Art. III, § 5(6)

## NORTH DAKOTA

**Motion for New Trial**

N.D. R. Crim. P. 33(b) - A motion for a new trial based on the ground of newly discovered evidence must be made within 30 days after discovery of the facts upon which it is made and within 2 years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

N.D. CENT. CODE § 29-32.1-01(1)(e) (1991) - Grounds for relief include that there exists evidence, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

N.D. CENT. CODE § 29-32.1-03(2) - An application may be filed at any time.

**Standard for Newly Discovered Evidence**

See Explanatory Note to N.C. R. Crim. P. 33 -

(1) The evidence must have been discovered since the trial, *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929);

(2) Failure to learn of the evidence at the time of trial was not the result of defendant's lack of diligence, *Nagell v. United States*, 354 F.2d 441, 448-49 (5th Cir. 1966);



(3) The newly discovered evidence is material to the issues at trial, *Mesarosh v. United States*, 352 U.S. 1, 77 S. Ct. 14 (1956); and

(4) The evidence is of such a nature that it would probably produce an acquittal in the event of retrial, 8A Moore's Federal Practice and Procedure (Cipes, 2d Ed. 1972), Para. 33.03(1), at pages 33-12, 33-13.

**Procedures for Pardon, Commutation, or Clemency**

Constitution of North Dakota, Art. V, § 6

## OHIO

**Motion for New Trial**

Ohio R. Crim. P. 33 -

(A)(6) A new trial may be granted on motion of the defendant for reasons affecting materially his substantial rights, including when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

(B) Para. 2 - Motions for new trial on account of newly discovered evidence shall be filed within 120 days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the 120 day period.

**Post-Conviction Remedies**

OHIO REV. CODE ANN. § 2953.21 *et seq.* (Baldwin 1986) - Contains no time limitation and no explicit provision for newly discovered evidence.

OHIO REV. CODE ANN. § 2953.23(A) - The court may, in its discretion and for good cause shown, entertain a second petition or successive petitions for similar relief on behalf of the petitioner based upon the same facts or on newly discovered evidence.

**Standard for Newly Discovered Evidence**

To the extent that the information is considered newly discovered evidence within the meaning of Crim.R. 33(A)(6), the motion for new trial must be filed within 120 days after the verdict. If a party is unavoidably prevented from filing a motion for new trial because the party had no knowledge of the existence of the ground supporting the motion for new trial, and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence, the motion for new trial should be allowed. *State v. Walden,* 483 N.E.2d 859; 864-65 (Ohio Ct. App. 1984).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Ohio, III § 11

## OKLAHOMA

**Motion for New Trial**

OKLA. STAT. ANN. tit. 22, § 952, Para. 7 (West 1986) - A court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against a



defendant by which his substantial rights have been prejudiced when, *inter alia,* new evidence is discovered, material to the defendant, which he could not with reasonable diligence have discovered before the trial.

Okla. Court Rules and Procedure § 952
A court may grant a new trial where new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial.

Okla. Court Rules and Procedure § 953
A motion for new trial based on newly discovered evidence may be made within three months after such evidence is discovered, but no later than one year after judgment is rendered.

**Post-Conviction Remedies**

OKLA. STAT. ANN. tit. 22, § 1080 *et seq.* - Contains no time limitations except with respect to prisoners who have received the death penalty.

OKLA. STAT. ANN. tit. 22, § 1080(d) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

OKLA. STAT. ANN. tit. 22 § 1089(C) - Application for post-conviction relief of a defendant who is under the sentence of death must be filed within 90 days of the denial of certiorari by the U.S. Supreme Court or the expiration of the time for filing a certiorari petition.

**Standard for Newly Discovered Evidence**

The test for whether a motion for a new trial should be granted based upon newly discovered evidence is: (1) the evidence must be material; (2) the evidence could not have been discovered before trial with due diligence; (3) the evidence cannot be

cumulative; and (4) the evidence must create a reasonable probability that, had the newly discovered evidence been introduced at the original trial, it would have changed the outcome. *Salyers v. State,* 755 P.2d 97, 101 (Okla. Crim. App. 1988).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Oklahoma, Art. 6, § 10

## OREGON

**Motion for New Trial**

OR. REV. STAT. § 136.535(1) (1989) - A motion in arrest of a judgment or a motion for a new trial shall be filed within five days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

Or. R. Civ. P. 64(B)(4) - A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for reasons materially affecting the substantial rights of the party, including the existence of newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

**Post-Conviction Remedies**

OR. REV. STAT. § 138.510 - The petition must be filed within 120 days of judgment if no appeal was taken, or 120 days of date appeal is final, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or an amended petition.



**Procedures for Pardon, Commutation, or Clemency**

Constitution of Oregon, Art. V, § 14

## PENNSYLVANIA

**Motion for New Trial**

Pa. R. Crim. P. 1123(a) - Within ten days after a finding of guilt, the defendant may file written motions for a new trial. Only those grounds may be considered which were raised in pre-trial proceedings or at trial, unless the trial judge, upon cause shown, allows otherwise.

(d) A motion for a new trial on the ground of after-discovered evidence must be filed in writing promptly after such discovery.

**Post-Conviction Remedies**

42 PA. CONS. STAT. ANN. § 9541 *et seq.* (1982) - Contains no time limitation.

42 PA. CONS. STAT. ANN. § 9543(a)(1) - Grounds for relief, which petitioner must prove by a preponderance of the evidence, include the unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

Pa. R. Crim. P. 1500 *et seq.* - Post-conviction collateral proceedings.

42 PA. CONS. STAT. ANN. § 6503(b) - Where a person is restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.

**Standard for Newly Discovered Evidence**

After-discovered evidence is the basis for a new trial only if it: (1) has been discovered after the trial and could not have been obtained at, or prior to, the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; (4) is of such nature and character that a different verdict will likely result if a new trial is granted. Furthermore, the proposed new evidence must be producible and admissible. *Commonwealth v. Brosnick*, No. 22W.D.1990, 1992 LW 103616 at *2 (Pa. 1992).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Pennsylvania, Art. 4, § 9

## RHODE ISLAND

**Motion for New Trial**

R.I. Superior Court R. Crim. Proc. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after entry of judgment by the court; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

R.I. GEN. LAWS § 10-9.1-1(a)(4) (1981) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

R.I. GEN. LAWS § 10-9.1-3 - An application may be filed at any time.



**Procedures for Pardon, Commutation, or Clemency**

Constitution of Rhode Island, Art. 9, §§ 4, 13

## SOUTH CAROLINA

**Motion for New Trial**

S.C. R. Crim. P. 29(b) - A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.

**Post-Conviction Remedies**

S.C. CODE ANN. § 17-27-10 *et seq.*- Contains no time limitation.

S.C. CODE ANN. § 17-27-20(a)(4) - Grounds for relief include that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.

Laches may bar any claim for collateral relief based on newly discovered evidence, *McElrath v. State*, 277 S.E.2d 890 (S.C. 1981), but the State must show prejudice in order to claim laches as a bar. *Brazell v. State*, 294 S.E.2d 343 (S.C. 1982).

**Standard for Newly Discovered Evidence**

While a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge, it is well settled that it may be granted only if the movant shows that the evidence upon which it is based: (1) is such as would probably change the result if a new trial was had; (2) has been

discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and, (5) is not merely cumulative or impeaching. *State v. Caskey*, 256 S.E.2d 737, 739 (S.C. 1979).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of South Carolina, Art. IV, § 14

## SOUTH DAKOTA

**Motion for New Trial**

S.D. CODIFIED LAWS ANN. § 15-6-59(B) - The motion for a new trial stating the grounds thereof shall be filed not later than ten days after the notice of entry of the judgment.

**Post-Conviction Remedies**

S.D. CODIFIED LAWS ANN. § 21-27-1 *et seq.*

S.D. CODIFIED LAWS ANN. § 21-27-3.2 - An application under this chapter may be dismissed if it appears that the state or the applicant's custodian has been prejudiced in its ability to respond to the application by delay in its filing, unless the applicant shows that the application is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances causing the prejudice occurred. It shall be presumed that the state or the applicant's custodian has been prejudiced if the application is filed more than five years after the filing of the judgment or order under which the applicant is held. This presumption is rebuttable.



**Standard for Newly Discovered Evidence**

For a habeas petitioner to avoid dismissal of a subsequent petition for failure to raise the issue in a prior proceeding, the petitioner must show: (1) cause for his omission or failure to previously raise the grounds for habeas relief; and (2) actual prejudice resulting from the alleged constitutional violation. *Gregory v. Solem*, 449 N.W.2d 827, 830 (S.D. 1989).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of South Dakota, Art. IV, § 3

## TENNESSEE

**Motion for New Trial**

Tenn. R. Crim. P. 33(b) - A motion for a new trial shall be made in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered.

**Post-Conviction Remedies**

TENN. CODE ANN. § 29-21-101 *et seq.* - Procedures for habeas corpus.

TENN. CODE ANN. § 40-26-105 (1990) - Relief also may be available under a writ of error coram nobis, but relief is confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that he was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if

the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

TENN. CODE ANN. § 40-27-103 - The writ of error coram nobis may be had within one year after the judgment becomes final.

TENN. CODE ANN. § 40-30-102 *et seq.* - The petition for post-conviction relief must be filed within 3 years of final appellate action.

**Standard for Newly Discovered Evidence**

The trial judge must make the following findings: (1) whether or not there now exists subsequently or newly discovered evidence (even though related to matters previously litigated); (2) which might have resulted in a different judgment had it been presented at trial; (3) but which was not presented at that time through no fault of the defendant. *Cole v. State,* 589 S.W.2d 941, 943 (Tenn. Crim. App. 1979).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Tennessee, Art. 3, § 6

## UTAH

**Motion for New Trial**

Utah R. Crim. P. 24 - Must be made within 10 days of judgment.

**Post-Conviction Remedies**

Utah R. Civ. P. 65B - Procedures for a "petition for extraordinary relief."



UTAH CODE ANN. § 78-12-31.1 (1990) - A petition for relief pursuant to a writ of habeas corpus must be filed within three months of judgment. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

UTAH CODE ANN. § 78-12-31.2 - No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefore are based on facts or circumstances which developed or first became known within that period.

**Standard for Newly Discovered Evidence**

To justify a new trial, newly discovered evidence should clarify a fact that was contested and resolved against the movant, or be sufficiently persuasive that the result of the trial might be changed. Newly discovered impeachment evidence does not ordinarily warrant a new trial. *State v. Worthen,* 765 P.2d 839, 851 (Utah 1988).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Utah, Art. VII, § 12

## VERMONT

**Motion for New Trial**

Vt. R. Crim. P. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

VT. STAT. ANN. tit. 12, § 3952 - Contains no time limitation and no explicit provision for newly discovered evidence.

VT. STAT. ANN. tit. 13, § 7131 - A prisoner who is in custody under sentence of a court and claims the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or of the state of Vermont, or that the court was without jurisdiction to impose the sentence, or is otherwise subject to collateral attack, may at any time move the county court of the county where the sentence was imposed to vacate, set aside or correct the sentence. However, the superior or district judge who presided when the original sentence was imposed shall not hear the application.

**Standard for Newly Discovered Evidence**

To be entitled to a new trial based on newly discovered evidence, a defendant must show: (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. *State v. Smith,* 485 A.2d 124, 130-31 (Vt. 1984); *State v. Richards,* 470 A.2d 1187, 1190 (Vt. 1983).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Vermont, Ch. II, § 20

## VIRGINIA

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Virginia, Art. V, § 12



## WASHINGTON

**Motion for New Trial**

WASH. REV. CODE ANN. § 4.76.080 - When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the time when the verdict was rendered, the application may be made by petition filed not later than after the discovery of the new evidence. No motion shall be filed more than one year after the final judgment was rendered.

Wash. R. Crim. P. 7.6 -

(a) The court on motion of a defendant may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected, including if there exists newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial;

(b) A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

**Post-Conviction Remedies**

WASH. REV. CODE ANN. § 10.73.090(1) - No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after judgment becomes final.

WASH. REV. CODE ANN. § 10.73.100(1) - The time limit in RCW 10.73.090 does not apply to a petition that is based solely on newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion.

**Standard for Newly Discovered Evidence**

A trial court may grant a new trial on the basis of newly discovered evidence only if the evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams,* 634 P.2d 868 (Wash. 1981).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Washington, Art. 3, § 9

## WEST VIRGINIA

**Motion for New Trial**

W. Va. R. Crim. P. 33 - A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment; if an appeal is pending the court may grant the motion only on remand of the case.

**Post-Conviction Remedies**

W. VA. CODE § 53-4A-1 *et seq.* (1981) - Contains no time limitation and no explicit provision for newly discovered evidence.

**Standard for Newly Discovered Evidence**

A new trial will be granted on the ground of newly discovered evidence in the following circumstances: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained; (2) it must appear from facts stated in his affidavit that plaintiff was diligent in that the new



evidence is such that due diligence would not have secured it before the verdict; (3) the evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point; (4) the evidence must be such as ought to produce an opposite result at a second trial on the merits; (5) and the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side. *State v. Catlett,* 376 S.E.2d 834, 835 (W. Va. 1988); *State v. Hamric,* 151 S.E.2d 252, 265 (W. Va. 1966).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of West Virginia, Art. 7, § 11

## WISCONSIN

**Motion for New Trial**

WIS. STAT. ANN. § 805.16(4) (West 1985) - A motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict.

**Post-Conviction Remedies**

WIS. STAT. ANN. § 974.06 - Contains no provision for newly discovered evidence.

WIS. STAT. ANN. § 974.06(2) - The motion may be made at any time.

**Standard for Newly Discovered Evidence**

The requirements for granting a new trial for newly discovered evidence are: (1) the evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence

must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. *State v. Boyce,* 249 N.W.2d 758, 760 (Wis. 1977).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Wisconsin, Art. 5, § 6

## WYOMING

**Motion for New Trial**

WYO. STAT. § 7-12-301(c) (1987) - A motion for new trial based on newly discovered evidence may be made only within 2 years after final judgment.

**Post-Conviction Remedies**

WYO. STAT. § 7-14-101 - Contains no time limitation and no explicit provision for newly discovered evidence.

WYO. STAT. § 7-14-103(c)(ii) - This act does not apply to claims of error or denial of rights where a remedy is provided by statute or court rule for new trial, sentence reduction, sentence correction or other post-verdict motion.

WYO. STAT. § 7-14-103(d) - No petition under this act shall be allowed if filed more than five (5) years after the judgment of conviction was entered.

WYO. STAT. § 1-27-101 *et seq.* - Habeas corpus.



**Standard for Newly Discovered Evidence**

It is incumbent on the party who asks for a new trial on the grounds of newly discovered evidence to satisfy the court by showing: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different verdict if the new trial were granted; and (4) that it is not cumulative, *viz.*, speaking to facts in relation to which there was evidence at the trial. *Opie v. State,* 422 P.2d 84, 85 (Wyo. 1967).

**Procedures for Pardon, Commutation, or Clemency**

Constitution of Wyoming, Art. 4, § 5